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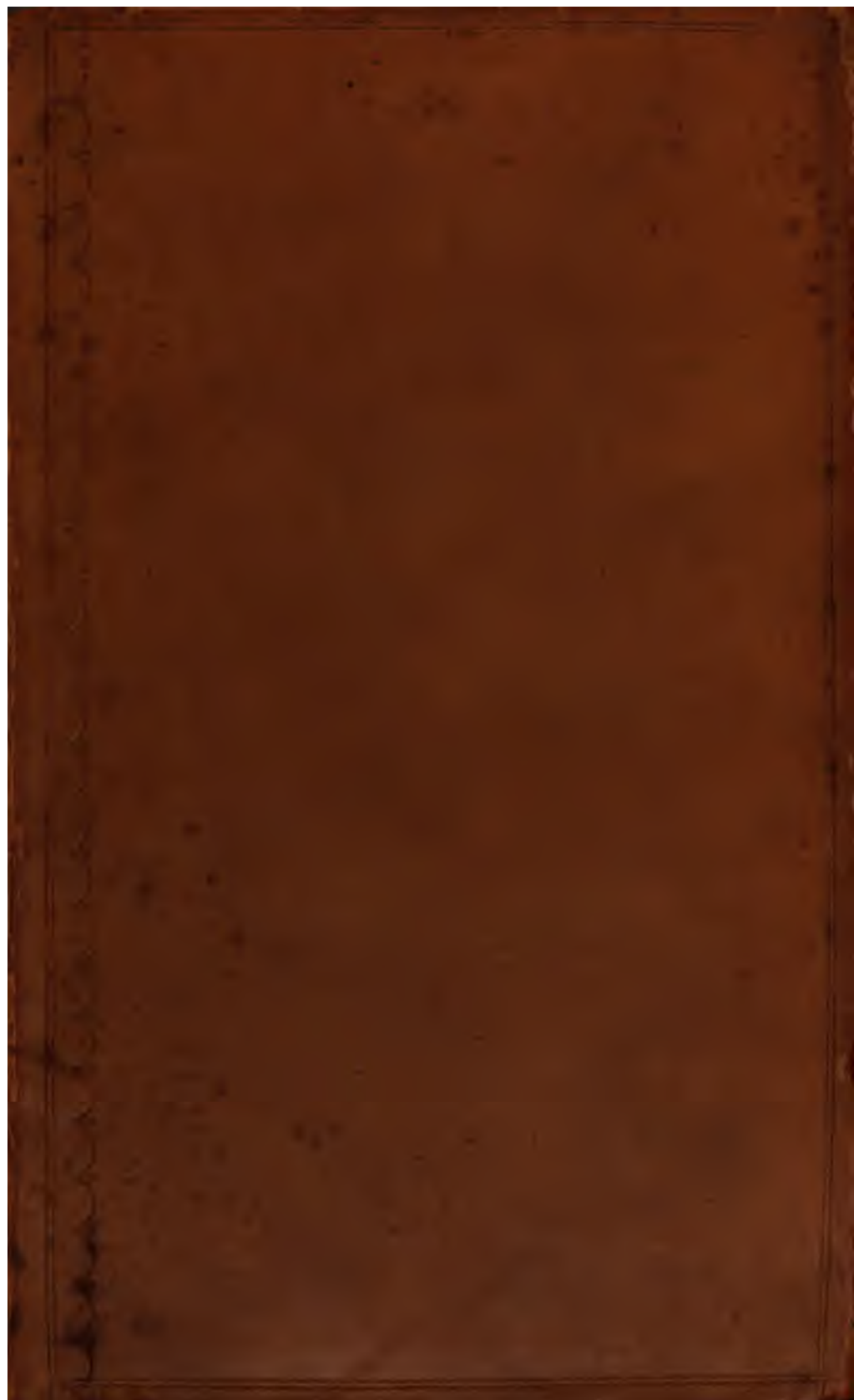
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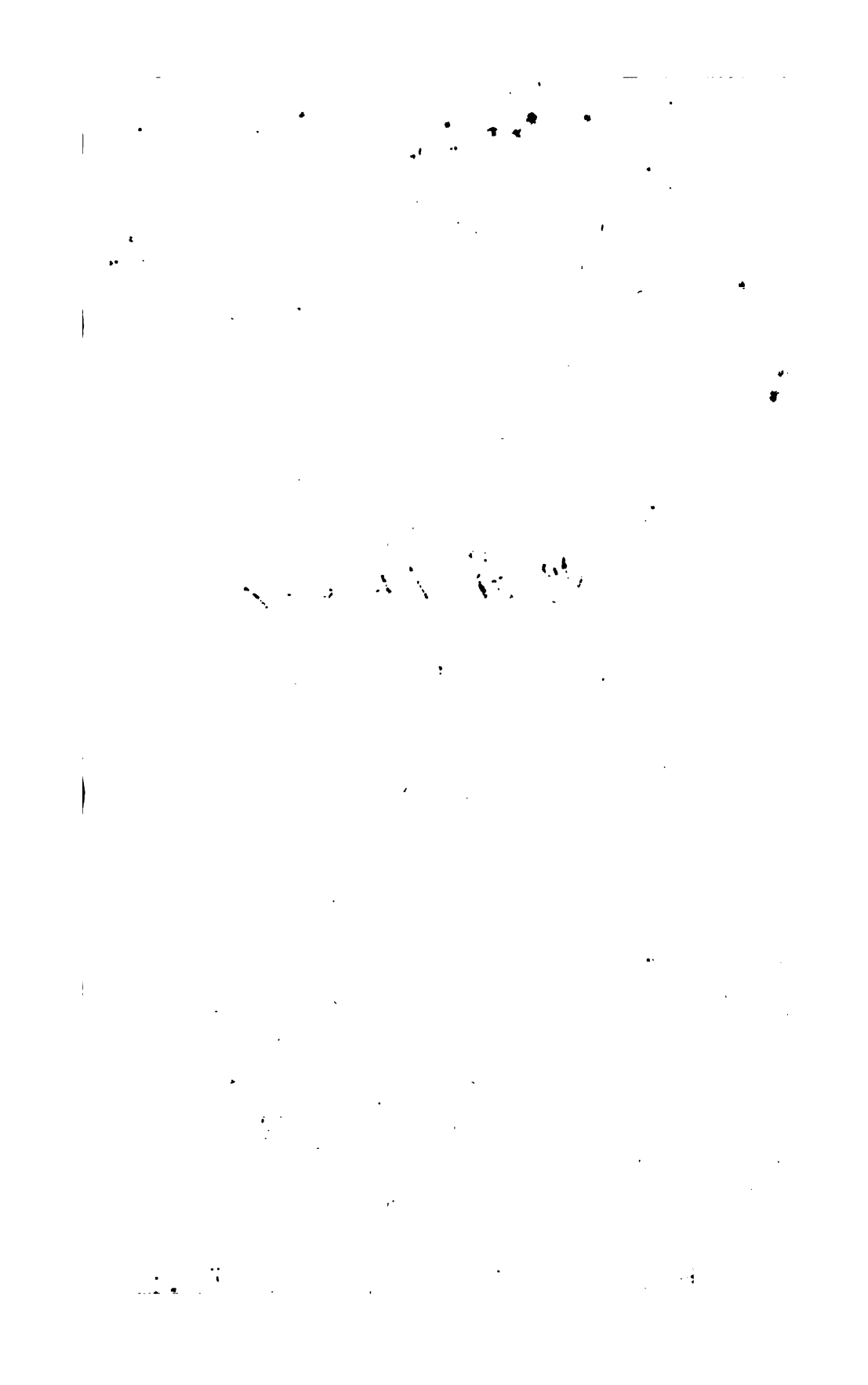


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THE
Modern Pleader,

CONTAINING

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ALL ACTIONS,

WITH NOTES THEREON;

ALSO,

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of Cases cited, and a copious Index: the whole made easy
and useful to *Students*, and to the

PRACTISERS IN TOWN AND COUNTRY;

Furnishing the *latter* with the necessary Instructions for their *Agents*.

By JOHN IMPEY, INNER-TEMPLE,

AUTHOR OF THE

INSTRUCTOR CLERICALIS,

IN THE COURTS OF KING'S BENCH AND COMMON PLEAS,

AS ALSO

THE OFFICE OF SHERIFF.

LONDON:

Printed for the AUTHOR, by His MAJESTY'S Law-Printers,
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1794.



TO
THE HONOURABLE
SIR FRANCIS BULLER, BART.
ONE OF HIS MAJESTY'S JUSTICES
OF THE COURT OF
COMMON PLEAS,
THE FOLLOWING WORK
IS
(BY HIS PERMISSION)
MOST RESPECTFULLY INSCRIBED,
BY
HIS MOST OBEDIENT, AND
OBLIGED HUMBLE SERVANT,
THE AUTHOR.

80 A. 14. 6. Jur.

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P R E F A C E.

*P*LEADING is confessed, by the most learned and experienced in the profession, to be the best *guide* to the knowledge of the common law, and a great *honor* and *ornament* to those who are skilful in it.

Had the books already in print on the subject been as useful as they are *numerous*, the present Work had never solicited the attention of the profession; but being, for the most part in *Law-French* and *Latin*, and consisting of precedents in *debt*, instead of *assumpsit*, the action now in use on contracts, they are, for the most part, become obsolete, as in the action of debt on simple contract, the defendant is entitled to wage his law.

To assist therefore the *student*, as well as the *practisers* in town and country, in the attainment of this very important branch

of the law, the Author has, in the following sheets, treated the subject methodically, by stating the nature of the *declaration*, being the *first* part of *pleading*; the several persons able to maintain it, and against whom it can be maintained; with the day, time, and place, in which the act ought to be laid; as also the several degrees of persons, so that they be rightly named. *Secondly*, the forms of the declaration by and against peers, members of parliament, bodies corporate and sole, executors and administrators, heirs and devisees, &c. with the several *præcipes* for *original* writs, in *all* actions now in use. *Thirdly*, a short *sketch* of the action of *account*, with the declaration, and useful notes thereon. *Fourthly*, the *origin* of the action of *assumpsit*, and its advantage, with the law on *express* and *implied contracts*; the statute of frauds and perjuries, with the several decisions to the present time; a short *account* of the action for *money had and received*, with the several cases, to which is subjoined the declaration; as also a great variety of declarations on *common assumpsits* now in use, the cases determined under each,

each, and the evidence necessary to support the action. *Lastly*, a concise treatise on promissory notes, with the several declarations and decisions in actions thereon, as also the evidence necessary to support them.

This arrangement of the several matters will, the Author conceives, save the student much labor and time, which he must otherwise devote to painful researches in the old books, not only for *precedents*, but *authorities* in support of them; a consideration that cannot fail of having its due weight. But it is not to the student alone, that the Author has endeavored to make his book useful; the *practisers*, both in *town* and *country*, will also find in it a valuable assistant. To the *latter*, it will be particularly so, as, upon consulting it, they will be furnished with the *necessary instruction* to give to their agents; the *want* of which, not only occasions *prolixity* and *delay*, but frequently turns out *fatal* to the cause.

The precedents in this volume are carefully drawn. At the foot of some, the Author has made observations on the length of *modern* declarations; which he does not wish to impute so much to the *pleader*, as to the *want of necessary instructions*.

The great encouragement the Author met with from the *profession* in his former publications, induced him to undertake this; and should it meet with approbation, the Author means to continue it.

That no errors are to be found in the Work, the Author dares not assert; yet he believes they are very few in number, and trifling in consequence. Such however as do exist, the Author hopes the experience of his friends will discover, and their candor point out.

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THE INTRODUCTION.

The Mode in which Alfred rendered the Execution of Justice.

AFTER *Alfred* had subdued and settled or expelled the *Danes*, he found the kingdom in the most wretched condition, desolated by the ravages of those barbarians, and thrown into disorders which were calculated to perpetuate its misery. Though the great armies were broken, the kingdom was full of the straggling troops of that nation, who, being accustomed to live by plunder, were become incapable of industry; and also, from the natural ferocity of their manners, indulged themselves in committing violence even beyond what was requisite to supply their necessities. The *English* themselves, reduced to the most extreme indigence by these continued depredations, had shaken off all bonds of government; and those who had been plundered to-day betook themselves next day to a like disorderly life; and from despair joined the robbers in pillaging and ruining their fellow citizens. These were the evils for which it was necessary that the vigilance and activity of *Alfred* should provide a remedy.

B

That

INTRODUCTION.

England divided into counties, subdivided into hundreds, and into tithings.

House holders answerable for family.

Tithings answerable for each other.

The tithing answerable for the crime of another.

Every man obliged to keep a watchful eye over his neighbour.

That he might render the execution of justice strict and regular, he divided all *England* into counties; these counties he subdivided into hundreds, and the hundreds into tithings.

Every house-holder was answerable for the behavior of his family and slaves, and even his guests, if they lived three days in his house. Ten neighbouring house-holders were formed into one corporation, who, under the name of a *tithing*, *decennary*, or *fribourg*, were answerable for each other's conduct, and over whom one person, called a *tithing-man*, *headbourg*, or *borsholder*, was appointed to preside. Every man was punished as an outlaw who did not register himself in some tithing; and no man could change his habitation without a warrant or certificate from the *borsholder* of the tithing to which he formerly belonged.

When any person in any tithing or decennary was guilty of a crime, the *borsholder* was summoned to answer for him; and if he was not willing to be surety for his appearance, and his clearing himself, the criminal was committed to prison, and there detained till his trial. If he fled either before or after finding sureties, the *borsholder* and decennary became liable to enquiry, and were exposed to the penalties of law. Thirty-one days were allowed them for producing the criminal; and if that time elapsed without being able to find him, the *borsholder*, with two other members of the decennary, was obliged to appear, and, together with three chief members of the neighbouring decennaries (making twelve in all), to swear that his decennary was free from all privy, both of the crime committed and of the escape of the criminal. If the *borsholder* could not find such a number to answer for their innocence, the decennary was compelled by fine to make satisfaction to the king according to the degree of the offence. *L. St. Edw.* 20. By this institution every man was obliged by his own interest to keep a watchful eye over the conduct of his

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his neighbours, and was, in a manner, surety for the behavior of those who were placed under the division to which he belonged; whence these decennaries received the names of frank pledges. *Wilk. p. 202. c. 2.*

He took care to temper these rigors by other institutions favourable to the freedom of the citizens, and nothing could be more popular and liberal than his plan for the administration of justice. The borsholder summoned together his whole decennary to assist him in deciding any lesser difference which occurred among the members of this small community. In affairs of greater moment, in appeals from the decennaries, or in controversies arising between members of different decennaries, the cause was brought before the *hundred*, which consisted of ten decennaries, or a hundred families of freemen, and which was regularly assembled once in four weeks for the deciding of causes. *Leg. Edw. c. 2.* Their method of decision deserves to be noted as the origin of juries; an institution admirable in itself, and the best calculated for the preservation of liberty, and the administration of justice, that ever was devised by the wit of man. *Twelve freeholders* were chosen, who, having sworn, together with the hundredor, or presiding magistrate of that division, to administer impartial justice, proceeded to the examination of that cause which was submitted to their jurisdiction. And beside these monthly meetings of the hundred, there was an annual meeting appointed for a more general inspection of the police of the district; for the enquiry into crimes, the correction of abuses in magistrates, and the obliging of every person to shew the decennary in which he was registered. The people, in imitation of their ancestors, the ancient *Germans*, assembled there in arms; whence a hundred was sometimes called a *wapentake*, and its court served both for the support of military discipline, and for the administration of civil justice. *Spellman in voce wapentake.*

Plan for the administration of justice.

Hundred.

The method of decision.

Crimes.

INTRODUCTION.

The next court to that of the hundred was the county court.

Sheriff appointed, Ingulf. 870.

The next superior court to that of the *hundred* was the *county court*, which met twice a-year after *Michaelmas* and *Easter*, and consisted of the freeholders of the county, who possessed an equal vote in the decision of causes. The *bishop* presided in this court, together with the *alderman*; and the proper object of the court was, the receiving of appeals from the hundreds and decennaries, and the deciding of such controversies as arose between men of different hundreds. Formerly, the *alderman* possessed both the civil and military authority; but *Alfred*, sensible that this conjunction of powers rendered the nobility dangerous and independent, appointed also a *sheriff* in each county, who enjoyed a co-ordinate authority with the former in the judicial function. His office also empowered him to guard the rights of the crown in the county, and to levy the fines imposed, which, in that age, formed no contemptible part of the public revenue.

Mr. *Reeve*, in his admirable Treatise on the *English Law*, says, "Though the *sheriff*, earl, or *alderman* (by all which names he was known) had properly the government of the county, a *bishop* was always associated with him in judicial matters. The *bishop* and *sheriff* used twice a-year to go a circuit within a month after *Easter*, and a month after *Michaelmas*, and held the great court called the *tourn* in every hundred in the county. This was the grand *criminal court*, in which all offences, both *ecclesiastical* and *civil*, were tried. On the examination of the *former*, the *bishop* sat as judge, and the *sheriff* as *coadjutor*, to inflict temporal punishments: in the latter, the *sheriff* was judge, and the *bishop* his *assistant*, to aid his sentences, if necessary, by *ecclesiastical* censures." This union of power was very advantageous to them both: the presence of the *bishop* added weight and reverence to the *sheriff's* proceedings, and the authority of the *sheriff* was equally useful to the *bishop*, by enforcing obedience to his decrees on such refractory offenders as would otherwise have despised

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despised the thunder of mere ecclesiastical censures.

3 *Black. Com.* 62.

The great court for civil business was the *county* County court. court, held once *every four weeks*. Here the sheriff presided; but the suitors of the court, as they were called, that is, the freemen or landholders of the county, were the judges, and the sheriff was to execute the judgment, assisted, if need were, by the *bishop*. Once a-year, at the *Easter tourn* (a) or *circuit*, the sheriff and bishop were to hold also a view of frank pledge; that is, to see every person above *twelve* years of age had taken the oaths of allegiance, and found nine *freemen pledges* for his peaceable demeanour.

Out of the *tourn* were derived two inferior criminal courts, the *hundred* and the *leet*, for the expeditious and easy distribution of justice, where a hundred or manor lay too remote to be conveniently visited in the course of the *tourn*. The hundred court was held before some *bailiff*; the *leet* before the *lord* of the *manor's steward*: both these, though held in the name of a subject, were the king's courts. Out of the *county court* was derived an inferior court of civil jurisdiction, called the *court baron*. This was held *from three weeks to three weeks*, and was in every respect like the county court; only the lord, to whom this franchise was granted, or his steward, presided instead of the sheriff.

The hundred and leet, whence derived.

The king's sovereign *eyre* or *court* removed with the king wherever he went, and wherever he went the *tourn* in that county ceased. On coming into the county, all matters depending in the *tourn* were brought into the *eyre*, and when *there*, the record was never afterwards parted with. *Gilb. C. P.*

In all these courts, justice was administered near the homes of suitors with dispatch, and without much expence. Besides these, there was a *superior court*, known by the name of *Wittenagemote*, which Wittenagemote.

(a) *Tour* or *tourn* signifies a circuit or perambulation. *2 Inst.* 70.

had a concurrent jurisdiction with them. This court sat in the king's palace, and used to remove with his person. *Ibid.*

There lay an appeal, in default of justice, from all these courts to the king in council; and as the people, sensible of the equity and great talents of *Alfred*, placed the chief confidence in him, he was soon overwhelmed with appeals from all parts of *England*. He was indefatigable in the dispatch of all these causes, *Affer*, p. 20; but finding that his time must be entirely ingrossed by this branch of duty, he resolved to obviate the inconvenience, by correcting the ignorance or corruption of the inferior magistrates, from which it arose. *Ibid.* 18, 21. He took care to have his nobility instructed in letters and the laws: he chose the *earls* and *sheriffs* from among the men most celebrated for probity and knowledge: he punished most severely all malversation in office, *Mirror*, c. 2. and he removed all the *earls* whom he found unequal to the trust; allowing only some of the most elderly to serve by a deputy till their death should make room for more worthy successors.

Alfred framed a body of laws deemed the origin of the common law.

The better to guide the magistrates in the administration of justice he framed a body of laws, which, though now lost, served long as the basis of *English* jurisprudence, and is generally deemed the origin of what is denominated the *common law*. He appointed regular meetings of the States of *England* twice a year in *London*; a city which he himself had repaired and beautified, and which he thus rendered the capital of the kingdom. The similarity of these institutions to the customs of the ancient *Germans*, to the practice of the other northern conquerors, and to the *Saxon laws* during the Heptarchy, prevents us from regarding *Alfred* as the sole author of this plan of government, and leads us rather to think, that, like a wise man, he contented himself with reforming, extending, and executing the institutions which he found previously established. But upon the whole, such suc-
cess

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cess attended his legislation, that every thing bore suddenly a new face in *England*. Robberies and iniquities of all kinds were repressed by the punishment or reformation of the criminals; yet, amidst these rigours of justice, this great prince preserved the most sacred regard to the liberty of his people, and it is a memorable sentiment preserved in his will, *that it was just the English should for ever remain as free as their own thoughts.* *Asser.* p. 24.

It is confessed, that our knowledge of the *Anglo-Saxon* history and antiquities is too imperfect to afford us means of determining with certainty all the prerogatives of the crown and privileges of the people, or of giving an exact delineation of that government. It is probable also, that the constitution might be somewhat different in the different kingdoms of the *Heptarchy*, and that it changed considerably during the course of six centuries, which elapsed from the first invasion of the *Saxons* till the *Norman conquest*. But most of these differences and changes, with their causes and effects, are unknown to us; it only appears, that at all times, and in all the kingdoms, there was a *national council* called a *Wittenagemote*, or assembly of the wise men (for that is the import of the term), whose consent was requisite for enacting laws and for ratifying the chief acts of *public administration*. But who were the constituent members of this *Wittenagemote* has not been determined with certainty by antiquaries. It is agreed, that the bishops and abbots were an essential part, *Spelm. Gloss.* and it is also evident from the tenor of those ancient laws, that the *Wittenagemote* enacted statutes which regulated the ecclesiastical as well as civil government, and that those dangerous principles, by which the church is severed from the state, were hitherto unknown to the *Anglo-Saxons*. It also appears, that the *aldermen*, or *governors of counties*, who after the *Danish* times were often called *earls*, were admitted into this council, and gave their consent to the public statutes. But besides the *pre-*

INTRODUCTION.

lates and *a'dermen*, there is also mention of the wites or wife men as a component part of the *Wittenagemote*; but who these were is not so clearly ascertained by the laws or the history of that period.

The members, by all ancient histories, are almost always called the *principes*, *satrapæ*, *optimates*, *magnates*, *precees*.

Anglo-Norman
government.

The general plan of the *Anglo-Norman* government was, that the court of barony was appointed to decide such controversies as arose between the several vassals or subjects of the same barony; the hundred court and county court, which were still continued as during the *Saxon* times, to judge between the subjects of the different baronies; and the *curia regis*, or *king's court*, to give sentence among the barons themselves. But this plan, though simple, was attended with some circumstances which, being derived from a very extensive authority assumed by the conqueror, contributed to increase the royal prerogative, and as long as the state was not disturbed by arms, reduced every order of the community to some degree of dependence and subordination.

The king sat in
person in his
court.

The king *himself* often sat in his court, which always attended his person. He there heard causes and pronounced judgment, *Mad.* 103; and though he was assisted by the advice of other members in it, it is not to be imagined that a decision could easily be obtained contrary to his inclination or opinion.

In the absence
of the king the
chief justiciar
presided.

In his absence the *chief justiciar* presided, who was the *first magistrate* in the state, and a kind of *viceroi* on whom depended all the civil affairs of the kingdom, *Spelm. Gloss.* The other chief officers of the crown, the *constable*, *mareschal*, *senechal*, *chamberlain*, *treasurer*, and *chancellor*, were members, together with such *feudal barons* as thought proper to attend, and the *barons of the exchequer*, who at first were also feudal barons, appointed by the king, *Maddox* 134. This court, which

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which was sometimes called the king's court, sometimes the court of exchequer, judged in all causes civil and criminal, and comprehended the whole business which is now shared out among the four courts—the chancery, the king's bench, the common pleas, and the exchequer. *Ibid.* 56. 70. The court now shared among the four superior courts.

Such an accumulation of powers was itself a great source of authority, and rendered the jurisdiction of the court formidable to all the subjects; but the turn which judicial trials took soon after the conquest served still more to increase its authority, and to augment the royal prerogatives. *William*, among the other violent changes which he attempted and effected, had introduced the *Norman law* into *England*, *Maddox Exc.* 27. had ordered all the *pleadings* to be in that tongue, and had interwoven with the *English jurisprudence* all the maxims and principles which the Normans, more advanced in cultivation and naturally litigious, were accustomed to observe in the distribution of justice. Law now became a science, which, at first, fell entirely into the hands of the Normans, and which, even after it was communicated to the English, required so much study and application, that the laity in those ignorant ages were incapable of attaining it, and it was a mystery almost solely confined to the clergy, and chiefly to the monks. *Malmes*, lib. 4. p. 123. The great officers of the crown, and the feudal barons who were military men, found themselves unfit to penetrate into those obscurities; and though they were entitled to a seat in the supreme judicature, the business of the court was wholly managed by the *chief justiciary* and the *law barons*, who were men appointed by the king, and entirely at his disposal. *Dugd. Origin. Jurid.* 25. This natural course of things was forwarded by the multiplicity of business which flowed into that court, and which daily augmented by the appeals from all the subordinate judicatures of the kingdom.

In the *Saxon times* no appeal was received in the king's court, except upon the denial or delay of justice In the Saxon times no appeal received in the king's courts;

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but the Con-
queror empower-
ed his court to
receive appeals.

M. 2. divided
the kingdom
into six circuits,
and sent justices
itinerant through
the land, 1176.

Kings of Eng-
land put them-
selves formerly
on the foot of
barbarous
princes.

justice by the inferior courts; and the same practice was still observed in most of the feudal kingdoms of *Europe*. But the great power of the *Conqueror* established at first in *England* an authority which the monarchs in *France* were not able to attain till the reign of St *Lewis*, who lived near two centuries after. He empowered his court to receive appeals both from the *courts of barony* and the *county courts*, and by that means brought the administration of justice ultimately into the hands of the sovereign. *Mad.* 65. *Glanv.* lib. 12. c. 1. 7. 2 *Inst.* cap. 20. And lest the expence or trouble of a journey to court should discourage suitors, and make them acquiesce in the decision of inferior judicatures, *itinerant judges* (b) were established, who made their circuit throughout the kingdom, and tried all causes that were brought before them. *Mad.* 83, 84. 100. By this expedient, the courts of barony were kept in awe; and if they still preserved some influence, it was only from the apprehensions the vassals might entertain of disobliging their superior by appealing from his jurisdiction. But the county courts were much discredited, and as the freeholders were found ignorant of the intricate principles and forms of the new law, the lawyers gradually brought all business before the *king's judges*, and abandoned the ancient simple and popular judicature. After this manner, the formalities of justice, which, though they appear tedious and cumbersome, are found requisite to the support of liberty in all monarchical governments, proved at first, by a combination of causes, very advantageous to the royal authority in *England*.

It appears, that the ancient kings of *England* put themselves entirely on the foot of the barbarous eastern princes, whom no man must approach without a present. Even justice was avowedly

(b) The judges *itinerant* continued till about 4 Ed. 3. Their jurisdiction extended to *pleas of the crown*, *civil suits*, and *pleas of liberties*, and *quo warrantos*.

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bought and sold, the king's court itself was open to none that brought not presents to the king. The bribes given for delay of justice were registered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of those times. *Vide Mad. Hist. of Exch.* 295. 311. Fines, amerciaments, and oblatas, were a considerable part of the royal revenue and power, *Mad.* 272. Amerciaments, or fines for crimes and trespasses, were another branch of the royal revenue, *ibid.* ch. 14.; and most crimes were atoned for by money.

A great baron, in ancient times, considered himself as a kind of sovereign within his territory, and was attended by courtiers and dependants, more zealously attached to him than the ministers of state and the great officers were commonly to their sovereign. He often maintained in his court the parade of royalty, by establishing a *justiciary, constable, marshal, chamberlain, seneschal, and chancellor*, and assigning to each of these officers a separate province and command. He was usually very assiduous in exercising his jurisdiction, and took such delight in that image of sovereignty, that it was found necessary to restrain his activity, and prohibit him by law from holding courts too frequently, *Dug. Orig.* 26. It is not to be doubted, but the example set him by the prince of a mercenary and sordid extortion would be faithfully copied, and that all his good and bad offices, his justice and injustice, were equally put to sale. He had the power, with the king's consent, to exact talliages even from the free citizens who lived within his barony; and as his necessities made him rapacious, his authority was usually found to be more oppressive and tyrannical than that of his sovereign, *Mad.* 520. He was able alone, in times of tranquillity, to obstruct the execution of justice within his territories; and, by combining with a few mal-contented, barons of high rank and power, he could throw the state in convulsion.

Great baron,
formerly a kind
of sovereign.

The

Ecclesiastical
causes to be
tried only in the
spiritual courts.

The power of the church was another rampart against royal authority; but this defence was also the cause of many mischiefs and inconveniences. The dignified clergy were not so prone to immediate violence as the barons; but as they pretended to a total independance on the state, and could always cover themselves with the appearance of religion, they proved, in one respect, an obstruction to the settlement of the kingdom, and to the regular execution of the laws. The policy of the Conqueror was, in this particular, liable to some exception. He augmented the superstitious veneration for *Rome* to which that age was so much inclined; and he broke those bands of connexion which, in the *Saxon times*, had preserved an union between the lay and the clerical orders. He prohibited the bishops from sitting in the county courts, he allowed ecclesiastical causes to be tried in spiritual courts only. *Wilk. 230. Spel. Con. 2 v. 14.*

Surnames introduced by the
Normans.

The *Normans* introduced the use of *surnames*, which tend to preserve the knowledge of families and pedigrees. They abolished none of the old absurd methods of trial by the *cross* or *ordeal*; and they added a new absurdity, the trial by single combat, *L. L. W. c. 68.* which became a regular part of jurisprudence, and was conducted with all the order, method, devotion, and solemnity imaginable, *Spel. Gloss.* The ideas of chivalry also seem to have been imported by the *Normans*; no traces of those fantastic notions are to be found among the plain and rustic *Saxons*. *Vide Dugd. Orig. Jurid. 82.*

The great charter contained no new establishment of new courts.

The great charter contained no new establishment of new courts, magistrates, or senates, nor abolition of the old. It introduced no new distribution of the powers of the commonwealth, and no innovation in the political or public law of the kingdom. It only guarded, and that merely by verbal clauses, against such tyrannical practices as are incompatible with civilized government, and if they become very frequent, are incompatible

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tible with all government. The barbarous licence of the kings, and perhaps of the nobles, was thenceforth more restrained. Men acquired some more security for their properties and their liberties; and government approached a little nearer to that end for which it was originally instituted, the distribution of justice, and the equal protection of the citizens. Acts of violence and iniquity in the crown, which were before only deemed injuries to individuals, and were hazardous chiefly in proportion to the number, power, and dignity of the persons affected by them, were now regarded, in some degree, as public injuries, and as infringements of a charter as calculated for general security. And thus the establishment of the great charter, without seeming any wise to innovate in the distribution of political power, became a kind of *epoch* in the constitution.

Mr. Reeve says, "The supreme court of ordinary judicature, established by William the Conqueror, was the *aula regis*, or *curia regis*; so called, because it was held in the king's palace before himself, or his justices, of whom the *summus justiciarius totius Angliæ* was chief." There was also the exchequer, called *curia regis ad scaccarium*, which was held likewise in the king's palace, either before the king, or his grand justiciary; and, though in effect a member of the *curia regis*, was expressly distinguished from it. In what manner the grand justiciary, who presided in both these courts, ordered or distributed between them the several pleas instituted there, or in what manner these pleas were conducted, it is difficult at this time precisely to determine, *Mad. Ex. 57*. Respecting the nature of this obsolete judicature, little more can be hoped, than such conjectures as may be founded on the few remaining monuments of antiquity, 1 *V. 49*.

The *curia regis* consisted of the following persons. The king himself was properly head, and next to him was the grand justiciary, who, in his absence,

Supreme court,
the *aula regis*.

Which consisted
of the king, &c.

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absence, was the supreme head of the court. The other members of this court were the *great officers* of the king's palace; such as the *treasurer, chancellor, chamberlain, steward, marshal, constable*, and the *barons* of the realm. To these were associated certain persons called *justitia* or *justiciarii*, to the number of five or six; on whom, with the *grand justiciary*, the burthen of the judicature principally fell: the barons seldom appearing there, as little valuing a privilege attended with labour, and the discussion of questions ill suited to their martial education. The justices were the part of this court that was principally considered, as appears by the return of writs, which was *coram me vel justiciis meis*; unless that appellation may be supposed to include every member thereof in his judicial capacity, p. 49.

All pleas cognizable in this high court.

All kinds of *pleas, civil and criminal*, were cognizable in this court, *Mad.* 70; and not only pleas, but other legal business arising between parties was there transacted. Feoffments, releases, conventions, and concords of divers kinds, were there made, especially in cases that required more than common solemnity. *Ibid.* 77. Many pleas from their great importance were proper subjects of enquiry there; others were brought by special permission of the king and his justices. *Ibid.*

The course of applying to the curia regis.

The course of application to the *curia regis* was of this nature: The party suing paid, or undertook to pay, to the king *a fine* to have *justiciam et rectum* in his court, and thereupon he obtained a writ or precept, by means of which he commenced his suit; and the justices were authorized to hear and determine his claim. These writs were made out in the name and under the seal of the king, but with the *teste* of the *grand justiciary*; for the making and issuing of which (as well as for other officers) the king used to have near his person some great man, who was called *his chancellor*, an ecclesiastic, and had the keeping of his seal: under the chancellor were kept clerks for making these writs.

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It was probably this office of the *chancellor* that rendered him a necessary member of the *curia regis*, to which, in fact, and to the justices, and not to the king, suitors made their complaint, and, upon paying the usual fine, were referred to the chancellor to furnish them with a writ, p. 50.

As the old establishment of the Saxons for de-termining pleas in the county court was continued, very few of those causes were brought into the *curia regis*. While men could have justice administered so near their homes, there was no temptation to undergo the extraordinary expence and trouble of commencing actions before this high tribunal; but the *partiality* with which justice was administered in the courts of arbitrary and potent lords, often left the king's subjects without prospect of redress in the inferior jurisdictions: the king and the *curia regis* became then an asylum to the weak. It is not remarkable that suitors, coming to a court under such circumstances, should consent to purchase the means of redress by paying a fine. Upon such terms was the *curia regis* open to all complainants; and the institution of suits was eagerly encouraged by the officers of that court. The exchequer was a sort of subaltern court, resembling in its model that which was more properly called the *curia regis*. Here likewise the grand justiciary, barons, and great officers of the palace presided. The persons who were justices in the *curia regis* acted in the same capacity here, this court being little else than the *curia regis* sitting in another place, namely, *ad scaccarium*; only it happened, that the justices, when they sat in the exchequer, were more usually called *barons*. The administration of justice in those days was so commonly attendant on the rank and character of a baron, that *baro* and *justiciarius* were often used synonymously. *Mad.* 134.

No action in time of *Saxons* commenced in *curia regis*, but as justice was administered with *partiality* this court became an *asylum* to the weak.

Exchequer;

Affairs of the revenue were the principal objects of consideration in the court of exchequer. The superintendance of this was the chief care of the justiciary

Revenue matters tried in the exchequer.

justiciary and barons, the cognizance of a great number of matters followed as incident thereto. However, it is thought the court of exchequer was not so confined to the peculiar business assigned it, and its incidents, as not to entertain such suits of a general nature as were usually brought in the *curia regis*; and it is probable this usage of holding common pleas at the exchequer continued till the time when common pleas were separated from the *curia regis*, *Mad.* 141. and that both courts ceased to hold pleas of common suits at the same time, and by the same prohibition. Other legal business, like that in the *curia regis*, was also transacted in the exchequer. *Madox*, 145.

Justices itinerant
appointed;

called *justiciarii*
in *itinera*, in re-
spect of other
justices that
were *residentes*.
4 *Inf.* 184.

Held plea of all
causes civil or
criminal.

By the multifarious and increasing business of these two courts, the grand justiciary, and his assessors on the bench, found themselves fully occupied; and as the application to these courts became more frequent, it was judged necessary, both in aid of themselves, and in relief of suitors, to erect some other tribunal of the same nature. Accordingly justices were appointed to go *itinera* or *circuits* through the kingdom, and determine pleas in the several counties. To these new tribunals was given a very comprehensive jurisdiction. As they were a sort of emanation from the *curia regis* and exchequer (except with the reservation of appeal thereto), they were endowed with all the authorities and powers of those courts. These justices (c) *itinerant* or *errant* in their several *itinera* or *eyres*, held plea of all causes, whether civil or criminal, and in most respects discharged the office of both the superior courts. The same persons who were justices in the king's court being (amongst others) *justices itinerant*, they

(c) In the black book in the exchequer, they are called *justiciarii deambulantes & perlostrantes*. *Ib.* *Eire*. *Ier.* signifieth the court of the justices in *eire*, and thereupon they were called *justiciarii itinerantes*, in respect that the justices residing at *Westminster* were called *justiciarii residentes*, and were much like at this day the justices of assize. *Co. Lit.* 293. a.

acted under the king's writ in the nature of a commission; and they went generally from seven years to seven years, though their circuits sometimes returned at shorter intervals.

They were directed and empowered to do in their *itineræ* all things of right and justice which belonged to the king and his crown, whether commenced by the *king's writ* or that of his *vicegerent*, where the property in question was not more than half a knight's fee, unless the matter was of such importance that it could not be determined but before the king; or the justices themselves, on account of any difficulty therein, chose to refer it to the king, or in his absence to those who were acting for him. So great was the authority of the justices in *eire*, that if they came into the county where the justices of the court of *common pleas* sat, the jurisdiction of that court *during the eire* ceased, but they yielded to the king's bench. 4 *Inst.* 185.

In executing the king's commission the plan was further improved; for that justice might not always be delayed in criminal cases till the justices *itinerant* came into the county, commissions occasionally issued, empowering the justices therein named to make a delivery of the gaol specified in the commission. But when these commissions were first brought into use does not appear. *Vide* 4 *Inst.* 162.

It was sometime after the appointment of justices *itinerant* that a court made its appearance, under the name of *bancum* or *bench*, as distinguished from the *curia regis*. This court, like that of the justices in *eire*, was probably erected in aid of the *curia regis*; and it is observable, that the *curia regis* ceased to entertain common pleas in its ordinary course much about the same time, when the *bancum* or *bench* is supposed to have been erected. It had been evidently the usage to hold pleas before the charter of king *John*, as *justiciarii nostri de banco* are therein mentioned; so that the clause de-
C claring

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clating *communis placita non sequantur curiam nostram sed teneantur in certo loco*, can no otherwise be understood than as contributing to settle and confirm what had been begun before. *Mad. Exc.* 539. In truth, it appears from records in the reign of Richard I. *Ibid.* 540.

Style of the
superior court
began to alter.

After the erection of the bank, the style of the superior court began to alter, and the proceedings there were frequently said to be *coram rege*, or *coram domino rege*; and in subsequent times, the court was stiled *curia regis*, *coram ipso rege*, or *coram nobis*, or *coram domino rege ubicunque fueris*, &c. as at this day. *Ibid.* 543. However, it was still called *aula regis*, *curia regis*, *curia nostra*, *curia magna*. *Ibid.*

As the exchequer was a member of the *curia regis*, and a place for determining the same sort of common pleas as were usually brought in the *curia regis*, the separation of such pleas from that court did considerably affect the exchequer. The clause in king John's charter equally concerned both courts; *curiam nostram* meant the exchequer as well as the court properly so called, *Revue* 58.

Thus having seen this grand institution of the Normans dilating its influence over the whole kingdom, encroaching on the ancient local tribunals of the people, by drawing into its sphere all descriptions of causes and questions, till having exerted, as it were, its last effort in sending forth the new establishments of *justices itinerant*, and justices of the bench, it disappeared by degrees from the observation of men, and almost from the records of antiquity, having deposited in its retirement the three courts of common law now seen in *Westminster Hall*, the *king's bench*, the *common pleas*, and the *modern court of exchequer*. The court of chancery probably acquired a separate existence much about the same time. *Mad.* 131, 132. If this is admitted, it will go a great way towards justifying one part of the maxim of the common lawyers, that the four courts of *Westminster Hall* are

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all of equal antiquity; though it refutes the other part of it, that they have been the same as they now are from time immemorial. *Ibid.*

The chancery was the *officina justitiæ*, the manufactory, if it may be so called of justice, where *original writs* were framed and sealed, and whither suitors were obliged to resort to purchase them, in order to commence actions, and so obtain legal redress. For this purpose the *Chancery* was open all the year, writs issued from thence at all times, and the fountain of justice was always accessible to the king's subject. The manner in which the business there conducted seems to have been this: the party complaining to the justices of the king's court for relief, used to be referred to the chancellor (in person, perhaps originally), and related to him the nature of his injury, and prayed some method of redress. Upon this the chancellor framed a writ, applicable to the complainant's case, and conceived so, as to obtain him the specific redress he wanted. When this had been long the practice, such a variety of forms had been devised, that there seldom arose a case in which it was required to exercise much judgment; the old forms were adhered to, and became precedents of established authority in the chancellor's office. After this, the making of writs grew to be a matter of course, and the business there increasing, it was at length confided to the chancellor's clerks, called *clerici cancellariæ*, and since *cursores cancellariæ*. A strict observance of the old forms had rendered them so sacred, that at length any alteration of them was esteemed an alteration of the law, and therefore could not be done but by the great council. It became not unusual in those times for a plaintiff, where no writ could be found in chancery that suited his case, to apply to parliament for a new one.

The chancery where originals issued, and were framed by the chancellor.

Cursores.

The separation of ecclesiastical causes from civil was not the least remarkable part of the revolution our laws underwent at the conquest. The joint jurisdiction exercised in the *Saxon* times by the

Separation of the bishop and sheriff.

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the bishop and sheriff was dissolved by an ordinance of *William*, as before observed, and the bishop was thenceforth to hold his court separate from that of the sheriff. *Wilk. Leg. Sax.* 292. *Sold. Tithes.* 413.

Trial by duel.

It had been a very ancient custom among the *Normans*, both in their own country and in *France*, to try titles by land and other questions, by duel.

Jurors.

We find, in the reign of *Henry II.* many questions of fact relating to property were tried by twelve *liberos et legales homines juratos*, sworn to speak the truth, who were summoned by the sheriff for that purpose, and it was not till his reign this trial became general. *Glanv. lib. 13. c. 1. lib. 2. c. 7. 19.*

Norman law mixed with the Saxons.

During the time which had elapsed since the conquest, the *Norman* law had sufficient opportunity to mix with all parts of our *Saxon* customs. This change was not particularly confined to the article of tenures, duel, juries, and conveyances. The manner in which justice was administered makes a distinguished part of the new jurisprudence. In the *Saxon* times, all suits were commenced by the simple act of the plaintiff lodging his complaint with the officer of the court where the cause was to be heard; and this still continued in the county and other inferior courts of the old constitution. But when it had become usual to remove suits out of these inferior courts, or of beginning them more frequently in the king's courts, it became necessary to agree upon some

In Saxon times how suits were commenced.

Of writs

settled forms of *precepts*, applicable to the purpose of compelling defendants to answer the charge alleged by plaintiffs. Such a precept was called *brevé*, probably because it contained briefly an intimation of the cause of complaint. It was directed to the sheriff of the county where the defendant lived, commanding that he should summon the party to appear in some particular court of the king, there to answer the plaintiff's demand, or to do some other thing tending to satisfy the ends of justice.

directed to the Sheriff.

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The necessity of such *brevia* was very obvious ; The necessity for writs. for tho' while most suits were transacted in the county court, it was sufficient to enter a plaint with the officer of the court, and the process issuing thereupon being to be executed by the sheriff, who was present, or supposed to be present as judge, was not likely to be extremely illegal or irregular, even when warranted perhaps by nothing more authentic than by verbal directions ; yet when suits were commenced in the king's court at a great distance from the habitation of the parties, and process was to issue to him merely as an officer, who knew nothing more of the matter than what the precept explained, it was necessary that something more particular should be exhibited to him, and therefore that the *precept* should be *written*. Hence perhaps it is, that the *brevé* was also called a writ.

These writs were of different kinds, and received different appellations, according to the object Distinction of writs. or occasion of them. The distinction between writs furnished a source of curious learning, which led to many of the refinements afterwards introduced into the law.

The cultivation of this kind of learning was encouraged by a regulation of the new law, which was designed for the more useful purpose of preserving the judgments and opinions of judges for the instruction of succeeding ages : this was the practice of entering proceedings of courts upon a *roll of parchment*, which was then called a *record*. This was entirely *Norman*, nor did it obtain to any great extent till long after the conquest. Of records.

It is conjectured, that the making inrollment of judicial matters in the *curia regis* was posterior in point of time to the same practice in matters of revenue, and was dictated by the experience of its utility in that important department. This innovation gave rise to the distinction between *courts of record*, and *courts not of record*. Courts of record, and not of record, what gave rise to the distinction of.

The record how began.

A record begun with the entry of the original writ; rehearsed the statement of the demand, the answer or plea, the judgment of the court, and execution awarded. Thus a record contained a short history of an action through all its stages. When this attention was observed in completing a record, it became a very authentic guide in similar cases. Records were in high estimation, and as they continued, the memorials of judicial opinions tended to fix the rules and doctrines of our law upon the firm basis of precedent and authority.

Such were the more conspicuous parts of the juridical system introduced by the Normans, and such were the changes they underwent during the period that elapsed before the end of the reign of king John.

H. 3. Pleadings grown to perfection.

In Henry the Third's time, the judicial records were grown to a much greater degree of perfection, and the pleadings more orderly; but the great troubles, and the civil wars that happened in his time, gave a great interruption to the legal proceedings of courts. *H. H. C. L.* 156.

Bracon.

Bracon's treatise yields us a great evidence of the growth of the laws between the time of H. 2. and H. 3. This book seems to borrow its method from the civil law, but the greatest part of the substance is either of the course of proceedings in the law known to the author, or of resolutions and decisions in the courts of *king's bench* and *common bench*, and before *justices itinerant*; "for now the inferior courts (says Hale) began to be of little use or esteem." *Ibid.* In this reign a *capias* was allowed to arrest the person in actions of account. 52 H. 3. c. 23.

The trials by ordeal was in this reign abolished.

Ed. 1.

We come now to the time of Ed. 1. who is well styled our *English Justinian*; for "in his time (says Sir Mathew Hale) the law quasi per saltum obtained a very great perfection." *H. H. C. L.* 157. The pleadings (d) are short indeed, but ex-

(d) *Ld. Coke* says, "Plain and simple, but nothing curious, ever having chief respect to matter and not to form of words." 1 *Inst.* 304. c. cellently

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cellently good and perspicuous; and, as touching the common administration of justice between party and party, and accommodating of the rules and of the methods and orders of proceeding, he did the most, or at least of any king since *William the First*, and left the same as a fixed and stable rule and order of proceeding very little differing from that which we now hold and practise, especially as to the substance and contexture thereof. He perfectly settled the *great charter*, and *charta de foresta*, not only by a practice consonant to them in the distribution of law and right, but also by that solemn act passed 25 *Ed. 1.* and stiled *confirmationes chartarum*. He established and distributed the several jurisdictions of courts within their proper bounds, and subdivided the same. He checked the encroachments and insolencies of the *pope* and the *clergy* by the statute of *Carlisle*. Declared the limits and bounds of the ecclesiastical jurisdiction by the statute of *circumspecti agatis & articuli cleri*; for though this latter statute was not published till *Ed. 2.* yet was compiled the beginning of *Ed. 1.* — *q. Ed. 2. stat. 2.* He established the limits of the court of *common pleas*, perfectly performing the direction of the *magna charta*, *quod communia placita non sequantur curia nostra*, in relation to *B. R.* and in express terms extending it to the court of exchequer by the stat. of *articuli super chartas*, *cap. 4.* He established the extent and jurisdiction between the steward and the marshal, *c. 3.* And he also settled the bounds of inferior courts, not only of counties, hundreds, and courts baron, which he kept within their proper and narrow bounds, and so gradually the common justice of the kingdom came to be administered by men knowing in the laws, and conversant in the great courts of king's bench and common pleas, and before *justices itinerant*; and also, by that excellent statute *Westm. 1. c. 35.* he kept the courts of great men within their limits under several penalties, wherein ordinarily very great encroachments

He settled the great charters.

Settled the bounds of the inferior courts.

and oppressions were exercised. He did not only explain, but excellently enforced *magna charta* by the statute *de tallagio non concedendo*, 34 Ed. 1. He provided against the interruption of the common justice of the kingdom, by mandates under the great seal or privy seal, by the stat. of *artic. super chartas*, c. 6. which, notwithstanding *magna charta*, had formerly been frequently in use: settled the forms of fines, confining them to the *common pleas* and to *justices itinerant*, which he did by stat. *de modo levandi fines*, 8 Ed. 1. stat. 4. The method of tenures by the stat. *quia emptores*, 18 Ed. 1. stat. 4. A speedier way for recovery of debts, not only for merchants and tradesmen, but also for other persons by granting an execution for a moiety of the lands by *elegit*. *Vide statutes Alton Burnell, &c de mercatoribus*, 11 Ed. 1. Made effectual provision for recovery of advowsons, and presentations to churches, by stat. *W. 2. c. 1*. Made that great alteration in estates from what they were formerly, by stat. *W. 2. c. 1*. whereby estates of fee simple, conditional at common law, were turned into estates tail, not removable from the issue by the ordinary method of alienation; and upon this statute, and for the qualifications thereof, are superstructures built of 4 H. 7. c. 32. 32 H. 8. and 33 H. 8. Introduced quite a new method, both in the laws of *Wales* and in the method of their dispensation, by the stat. of *Rutland*. stat. 12 Ed. 1.

Fines.

Elegit.

Advowsons.

Alteration of
estates by mak-
ing estates tail.

*Writs of nisi
prius constituted.*

It was wisely foreseen by this king, that when he designed no further *justices in eyre* to dispatch business in their proper counties, that the jury might be brought up to the courts above, which would occasion great expence and great confux of people to the courts, he constituted the writs of *nisi prius*, that the matters of law might be tried in his own court, and the facts in the country; and thereon there was a perfect uniformity in the law, for the same *justices itinerantes* in vacation time, who tried the fact in term time, settled the law;

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law; and henceforward, when they found this answered the expectation, the justices in *eyre* were totally disused. *Gilb. C. P.* 71. Sir *Matthew Hale* says, partly by the learning and experience of his judges, and partly by his own wise interposition, he silently, and without noise, abrogated many ill and inconvenient usages, both in his courts of justice and in the country. He rectified and set in order the method of collecting his revenue in the exchequer, and removed obsolete and illeivable parts thereof out of charge; and, by the statute *W. 1. 2. Gloucester, and Westm. 3.* and of *articuli super chartas*, he did remove almost all that was either grievous or impractical out of the law, and the course of its administration, and substituted such apt, short, pithy, and effectual remedies and provisions, as, by the length of time, and experience of their convenience, have stood ever since without any alteration, and are now, as it were, incorporated into, and become part of the common law itself. Upon the whole matter it appears, that the very schemes, mould, and model of the common law, especially in relation to the administration of common justice between party and party, as it was highly rectified, and set in a much better light and order by this king than his predecessors left it to him, so, in a very great measure, it has continued the same in all succeeding ages to this day; so that the mark or *epocha* we are to take for the true stating of the law of *England*, what it is, is to be considered, stated, and estimated from what it was when this king left it. Before his time, it was, in a great measure, rude and unpolished, in comparison of what it was after his reduction thereof; and, on the other side, as it was thus polished and ordered by him, so has it stood hitherto without any great or considerable alteration, abating some few additions and alterations which succeeding times have made, which, for the most part, are in the subject matter of the laws them-

themselves, and not so much in the rules, methods, or ways of its administration.

Other improvements

called Stat.
West. 2.

Other improvements made in the administration of justice, were the introduction of bills of exception, 13 *Ed. 1. c. 31.* and the proceeding by reversing judgments of above a year standing, c. 45. Also the statute of *Gloucester*, 6 *Ed. 1. c. 1.* whereby the demandant may recover against the tenant the costs of his writ, together with his damages. A *capias* was allowed to arrest the person in actions of debt and detainue, 13 *Ed. 1. c. 11.* 25 *Ed. 3. c. 17.* and in all actions on the case, 19 *H. 7. c. 9* ; and the 13 *Ed. 1. c. 41.* gives to all persons a liberty of appearing and appointing an attorney. 2 *Inst.* 449.

Edward took care to provide his courts with proper persons to practise, hence attorneys were appointed.

Edward was extremely careful to provide his courts with persons properly qualified to practise there. In the twentieth year of his reign, he specially directed *John de Mettingham*, then chief justice of the bench, and the rest of his fellows, justices of that court, to provide and appoint, according to their discretion, from every county, *attornatos et apprenticios qui curiam sequantur, et se de negotiis in eadem curia intromittant et alii non.* It appeared to the king and council, that seven fore would be sufficient; but the justices, if they saw fit, were authorized to exceed that number. *Ryl. Plac. Parl.* 104.

Different orders of practisers stated by *Flota.*

The different orders of practisers are thus stated by *Flota*: *Servientes narratores, attornati, et apprenticii, lib. 2. c. 37.* The apprentices, it should seem, were students, who, it is said, were first permitted by *Ed. 1.* to practise in the king's bench, in order to qualify themselves in a course of years to become *servientes* or *serjeants*. Whether *servientes* and *narratores* (or, as they were called in *French*, *counters*) were two distinct orders, or *narrator* was only an additional description of a *serjeant*, may be doubted. It has commonly been taken in the latter sense in stat. *Westm. 1. c. 29.* where the same words come together, *si serjeant counters*

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counters are autre; and that statute ordains imprisonment for a year and a day on a person of that description who was guilty of any collusion in practice. As neither attorneys nor apprentices are mentioned in that statute, we may suppose such persons were not then entrusted with the conduct of business in court; if so, it is probable they had not that authority till the above ordinance, though it may be observed, that *Flota* speaks of them as equally subject to this punishment *with serjeants counters*.

In *Edward* the Third's time the law was improved to the greatest height (e); the judges and pleaders were very learned, and more polished than those in the time of *Ed. 1.* yet they have neither uncertainty, prolixity, nor obscurity; and from the time of *Edw. 1.* to the period in which *Sir Matthew Hale* wrote, the learning of the common law consisted principally of assizes and real actions, and rarely was any title determined in any personal actions; unless in cases of titles to rents, or services by replevin. But the times of *Hen. 6.* as also *Ed. 4.* *Ed. 5.* and *Hen. 7.* were times that abounded with learned and excellent men. *Real actions and assizes* were not so frequent as formerly; but many titles of lands were determined in *personal actions*, and the reasons hereof seem to be, because the learning of them began by little and little to be less known or understood. 2. The ancient strictness of preserving possessions to possessors till eviction by action began not to be so much in use, unless in cases of descents and discontinuances; 3. because the Stat. 8 *Hen. 6.* had helped men to an action to recover their possessions by a writ of forcible entry, even while the method of recovery of possessions by ejectment was not known or used.

Ed. the 3d's time law improved, and pleaders learned men.

Mixed actions.

(e) Pleadings grew to perfection, both without lameness and curiosity; for then the judges and professors were excellently learned men, and the knowledge of the law flourished; the serjeants drew their own pleadings. *1 Inst. 304. b.*

After

After H. 2.
pleadings were
much longer
than in Ed. 3's
time. *Vid.*
2 *Inst.* 304. b.

After Hen. 8. Lord Hale says, "Pleadings were much longer than in Ed. 3. and the pleaders and the judges too became somewhat too curious therein;" so that art or dexterity of pleading (f), which in its use, nature, and design was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a piece of nicety and curiosity; which how these later times have improved, the very length of the pleadings, the many and unnecessary repetitions and mis-carriages of causes upon small and trivial niceties in pleading, have too much witnessed. *H. H. C. L.* 172. I am convinced that pleadings need not be half the length they are now drawn; but that may be owing to the want of proper instructions given to the pleaders.

Stat. of Jeofail.

The old pleaders were, in every point of the process and proceeding in an action, very scrupulous, so as to cavil at mistakes in syllables and letters. As many of these mistakes were owing to the negligence of clerks, it was thought prudent to remove some of those frivolous objections; and therefore, by stat. 14 Ed. 3. ft. 1. c. 6. it was enacted, "That by the misprision of a clerk in any place whatsoever, by mistaking in writing one syllable or one letter too much or too little, no process should be annulled or discontinued, but amended in due form as soon as perceived."

Pleadings to be
in English.

Some further regulation on this subject was made by stat. 36 Ed. 3 ft. 1. c. 15. which recites, because it has been often shewed to the king by the prelates, dukes, earls, barons, and all the commonalty, of the great mischiefs which have happened to divers of the realm, because the laws, customs, and statutes of this realm be not commonly holden and kept in the same realm, for that

(f) Lord Coke says, in the time of H. 6. the judges gave a quicker ear to exceptions than in the time of Ed. 4.

they

they be pleaded, shewed, and adjudged in the *French tongue*, which is much unknown in the said realm, so that the people, which do implead or be impleaded in the king's courts, and in the courts of others, have no knowledge nor understanding of that which is said for them or against them, by their *serjeants* and other *pleaders*, and that reasonably the said laws and customs will be rather perceived and known, and better understood in the *tongue used in the said realm*, and by so much every man of the said realm may the better govern himself without offending of the law, and the better keep safe and defend his heritage and possessions; and for that in divers countries, where the king and nobles, and others of the said realm, have been, good governance and full right is done to every person, because that their laws and customs be learned and used in the tongue of the country. The king, desiring the good governance and tranquillity of his people, and to put out and eschew the harms and mischiefs which do or may happen in this behalf, by the occasions aforesaid, hath ordained and established by the assent aforesaid,

*“ That all pleas, which shall be pleaded in any courts Pleadings to be
whatsoever, before any of his justices whatsoever, or in English
in his other places, or before any of his other ministers
whatsoever, or in the courts and places of any other
lords whatsoever within the realm, shall be pleaded,
shewed, defended, answered, debated, and adjudged in
the ENGLISH TONGUE, and that they be entered and
enrolled in Latin;”* which latter was no more than confirming the ancient practice, records of courts always having been in *Latin*.

Thus the language, which the Conqueror had imposed upon our courts, (the strongest badge of servitude perhaps that could be devised) was suffered no longer to maintain its ground. The victories of *Edward*, having given the *English* a declared superiority over the descendants of their former masters, seemed rather to mark this as a proper time for such a revolution. Though the language

The prothonotaries being used to make notes in French still continued the old way, it being a language much shorter and more expeditious to take notes; of these are composed the year books. *Gilb. C. P. 47.*

language of our courts in all arguments and decision was henceforward to be *English*, the *French* still continued to be the *written language of the law*, being that in which it had used to lisp in its infancy, and to which in its maturer years it was still attached as a sort of mother tongue. Thus many apt and significant terms were still retained in debate and conversation upon topics of law, and the reports of what passed in court were still taken and published in *French*, and so continued for hundreds of years after. It was foreseen and intended by the makers of this act, that much of the old *language* should still remain; for, after the above change is ordained, there are added the following reservations, namely, *that the laws and customs of the realm, terms and processes, be holden and kept as before had been*; and, *that by the ancient terms and forms of counting, no man should be prejudiced so that the matter of the action be fully shewed in the declaration and in the writ*; which only meant, that though such established and known forms of expression were not in *English*, yet it should be no breach of this statute.

Pleadings were carried on as before; but the latter end of this reign brought to more certainty, and pleadings were drawn.

Pleadings in causes were carried on through great part of this reign much in the same way in which it was described in the former period, and, towards the latter part, brought to more certainty and system than it had before exhibited; and it became the practice to draw up the declarations and pleas *out of court*, and pleadings were somewhat more polished than in the former reign, without running into *uncertainty, prolixity, or obscurity*. *H. H. C. L. 168.*

Lord Ch. Baron *Gilb.* in his History of the Origin of the King's Bench, says, "In the common pleas, the serjeant for the plaintiff counted *ore tenus in French*, which was minuted by the *prothonotary* (g), and this was done *the same term the writ*

(g) The prothonotaries were *scribes* who took the acts of the court, and had the same name in the courts of the empire; and in the first erection of the C. P. there being only three judges, each had his prothonotary. *Gilb. C. P. 46.*

was

was returnable; as the defendant's *serjeant* was not ready, he craved time to answer (which they called *importance*) till the subsequent term, then the plaintiff's *serjeant* counted over again and the defendant's *serjeant* pleaded, which pleadings were likewise entered by the *prothonotary*, and copies made for each party, that they might see whether the entries were rightly made: the proceedings of the first term they called the *importance roll*, and those of the second term the *pled rolls*, 314.

Before the statute 26 Ed. 3. the court, upon proposal of the declaration and plea, judged the legality of it; and if either were vicious, they counted again or pleaded *de novo*. From hence it is, that a plaintiff shall not discontinue without leave of the court, after a demurrer entered, verdict or writ of enquiry, because they commonly asked the opinion of the court, and if they would enter contrary to the court's opinion, they would not let them withdraw their pleadings without their leave. *Ibid.*

When by this statute the pleadings in *French* were taken away, they began to plead as they would stand by, and the court would not adjudge, but on the pleadings in paper, and afterwards on entries made on the roll; upon this, instead of counting in court, pleadings were delivered into court, while the *prothonotary* entred on paper, and delivered over copies to the other side, in order that the whole proceedings might be settled exactly; from thence the rolls were made up, and upon these proceedings the court gave their judgment.

According to the ancient practice, the original gave notice of the plaintiff's demand, and upon the return of that original, if the defendant did not *essoign*, on the *essoign day*, he was obliged to appear on the appearance day, and the plaintiff was to be ready to count, and the defendant to plead, and so they put the point in issue, either by *demurrer* or *trial per pais*, the same term; and originally

Before Stat. 26
E. 3. the court,
on proposal of
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and plea, judged.

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dant did not
essoign, he ap-
peared and plain-
tiff counted.
All business was
determined same
term.

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ginally all business was determined the same term the original was returnable in, unless it was adjourned for difficulty, or to be tried in the country by a jury; the very notion of terms originally being the same as the commissioners of oyer and terminer at this day, which are to dispatch all business that comes before them: afterwards, when the statute of *Wesim.* 2. gave power to every body to appoint his attorney, there were numbers of attorneys that attended the courts and instructed the serjeants in their clients cause; for which the court allowed them a proper time, and as they had four days to appear in after the return of the writ, so they gave them four days to plead after the appearance.

Attornies appointed, who instructed the serjeants.

The entries continued in Latin till *Cromwell's* time.

At the restoration of *Charles* entries again in Latin till 1730.

This statute recites the substance of 36 *Ed.* 3.

The entries continued in Latin till the subversion of our ancient constitution under *Cromwell*, when, among other innovations in the law, the language of the records was altered and turned into *English*. But, at the restoration of king *Charles*, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued, without any sensible inconvenience, till about the year 1730, when it was again thought proper that the proceedings at law should be done into *English*, and it was accordingly so ordered by the statute 4 *Geo.* 2. c. 26. This act recites, that many mischiefs did frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an unknown language, those who were summoned and impleaded having no knowledge or understanding of what was alledged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any, but persons practising the law, to remedy which, and to protect the lives and fortunes of the subjects more effectually than heretofore from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an
unknown

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unknown language, it enacts, "That, after the 25th March 1733, all writs, process, and returns, and all pleadings, &c. in any court of justice which concern the law and administration of justice, shall be in the *English tongue*, and not in *Latin* or *French*, and shall not be written in court hand; and *mistranslations, errors in form, misspellings in* Amendment of *clerkship, may be amended before or after judgment,* errors. *on payment of costs."*

Mr. Justice Blackstone says, this act was made Mr. Just. Black- in order that the common people might have *Stone's opinion of* knowledge and understanding of what was al- the above act. lowed or done for or against them in the process and pleadings, the judgment and entries in a cause; which purposes I know not how well it has answered; but am apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already Inconveniences. arisen from the alteration, that now *many clerks and attornies are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the First.* The translation also of The translation- of technical terms, &c. were found ridiculous; (a writ of *nisi prius, quare impedit, fieri facias, habeas corpus*, and the rest not being capable of an English dress with any degree of seriousness,) that, a new act was made to continue them in the usual language. in two years time, a new act was obliged to be made, 6 G. 2. c. 14. which allows all *technical words to continue* in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

What is said of the alteration of language by Reading of an- the stat. 4 Geo. 2. c. 26. will hold equally strong cient records an- with respect to the prohibition of using the ancient object of science. immutabile court hand in writing the records or other legal proceedings, whereby the reading of any record that is forty years old is now become the object of science, and calls for the help of an antiquarian. Black. Com. 3 v. 323.

D

In

H. 6. to Ed. 4. In *Hen. 6.* and *Ed. 4.*'s time, it appears, that every thing, which concerned the frame and proceedings of actions, was now agitated and refined upon with the greatest dexterity and skill. The writ, the declaration, the consequent pleadings, the process, the judgment; all these were debated under every possible consideration, and the forms and course of them were settled upon solemn deliberation.

Littleton's opinion of the skill of pleading.

Pleading had become so much the fashionable study, and it constituted such an essential part of the qualifications of a lawyer, that *Littleton*, in the reign of *Ed. 4.* declares it to be "*one of the most honorable and profitable things in the law to have the science of well pleading in actions real and personal,*" and advises his son "*especially to employ his courage and care to learn it.*" The reports of these times

Reports of these times.

are full of points of pleading, which are started, in one shape or other, in almost every question debated in court. *Pleading* was cultivated with so much industry and skill, that it was raised to a sudden perfection in the course of a few years.

Every thing substantial in pleading was practised.

Almost every thing substantial in pleading, which was practised from this time down to the present, says Lord *Hale*, was settled by judicial determinations in the reigns of these kings. The precedents of this period became ever afterwards the standards of good pleading, and the rules and maxims of pleading then settled have governed ever since in our courts. *H. H. C. L.*

When all the pleadings were ore tenus, if a slip was perceived and objected, to it was acknowledged, and court rectified same.

In the early ages of our jurisprudence, when all pleadings were *ore tenus*, if a slip was perceived and objected to by the opposite party, or the court, the pleader instantly acknowledged his error, and rectified his plea; which gave occasion to that length of dialogue reported in the ancient year books. So liberal were then the sentiments of the crown, as well as the judges, that, in the statute of *Wales*, 12 *Ed. 1.* the pleadings are directed to be carried on in that principality *sine calumniâ verborum non observata illa dura consuetudine, qui cadit à syl-*

à syllabâ cedit à totâ causâ. The judgments were entered up immediately by the clerks and officers of the court; and if any mis-entry was made, it was rectified by the minutes, or remembrance of the court itself.

When the treatise by Britton was published in the name and by the authority of the king, a check seems intended to be given to the unwarrantable practice of some judges, who had made false entries on the roll to cover their own misbehaviour, and had taken upon them, by amendments and erasures, to falsify their own records. About 13 Ed. 1. False entries made by judges. The king therefore declares, "*That although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record, shall be a warranty for their own wrong; nor that they may raze their rolls, nor amend them, nor record them contrary to their original enrollment.*" *Brit. proem 2, 3.* The whole of which taken together amounts to this, that a record, surreptitiously or erroneously made up to flatter or prevent the truth, should not be a sanction for error, and that a record, originally made up according to the truth of the case, should not afterwards, by any private rasure, or amendment, be altered to any sinister purpose.

But when afterwards Edward, on his return from his dominions in the 17th year of his reign, after upwards of three years absence, found it necessary to prosecute his judges for corruption and other mal-practices, the perversion of judgments, by erasing and altering records, was one of the causes assigned for the heavy punishments inflicted upon almost all the king's justices, *even the most able and upright.* The severity of which proceedings, seems so to have alarmed the succeeding judges, that, through a fear of being said to do wrong, they hesitated at doing that which was right. As it was so hazardous to alter a record, even from compassionate motives (h), they resolved not to touch a record

Not to amend records.

Edward on return found it necessary to prosecute his judges for corruption.

(h) *Hengham's case, 3 Pryn. 401, 402.*

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any more, but held, that even palpable errors, *when enrolled and the term at an end*, were too sacred to be rectified and called in question; and because *Britton* had forbidden all criminal and clandestine alterations to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In *Edward the Third's* time indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below, 1 *Hal. P. C.* 647.; but instead of amending the clerk's erroneous record, they made a second enrollment of what the justice had declared *ore tenus*, and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every record is said to import in itself. *Co. Lit.* 117. And in the reign of *R. 2.* there are instances of their refusing to amend the most palpable errors and mis-entries, unless by authority of parliament. 1 *Hal. P. C.* 648.

Every slip held
fatal.

To this real fullness, but affected timidity of the judges, such a narrowness of thinking was added, that every slip (even of a syllable or a letter) was now held to be fatal to the pleader, and overturned his client's cause. If they durst not, or would not, set right mere formal mistakes at any time upon equitable terms and conditions, they at least should have held, that trifling objections were at all times inadmissible; and that more solid exceptions in point of form came too late *when the merits had been tried*. They needed not have granted an amendment where it would work an injustice to either party, or where he could not have been put in as good a condition as if his adversary had made no mistake.

Verdicts reversed
for slips or mis-
spellings.

The precedents then set, were afterwards most scrupulously followed, 8 *Rep.* 156. to the great obstruction of justice and ruin of the suitors, who have formerly suffered as much by these obstinate scruples and literal strictness of the courts, as they could

could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or misspellings (i), and justice was perpetually entangled in a mere technical *jargon*. The legislature hath therefore been forced to interpose, by no less than *twelve statutes* (k), to remedy these opprobrious niceties, (and its endeavours have been of late so well seconded by judges of a *more liberal cast*, that this unseemly degree of strictness is almost entirely eradicated,) by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained but for some *material mistake assigned*.

The last of these statutes enacts, "That where any verdict hath been or shall be given in any action, suit, bill, plaint, or demand, in any of his majesty's courts of record, the judgment thereupon shall not be stayed or reversed for any defect or fault, either in form or substance, in any bill, writ, original, or judicial, or for any variance in such writs from the declaration or other proceedings."

(i) It is good for a learned professor, says Lord Coke, to make all things plain and perfect, and not to trust to the after-aid or amendment by force of any statute, lest his client's cause matcheth not therewith, *Præstat capula quam medela*. 1 Inst. 304. b.

(k) 14 Ed. 3. c. 6. 9 H. 5. c. 4. 4 H. 6. c. 3. 8 H. 6. c. 12 & 13. 32 H. 8. c. 30. 18 Eliz. c. 14. 21 Jac. 1. c. 13. 16 & 17 Car. 2. c. 8. 4 & 5 Ann. c. 20. 5 Geo. 1. c. 13.

12

Of Pleas and Pleading.

PLEAS or suits are regularly divided into two Pleas are divided into two sorts. sorts; *pleas of the crown*, which comprehend all crimes and misdemeanors wherein the king (on the behalf of the public) is the plaintiff, and *common pleas*, which include all civil actions depending between subject and subject. And in every count there must be at least *three* constituent parts, the *actor*, *reus*, and *judex*; the *actor* or plaintiff who complains of an injury done, the *reus* or defendant who is called upon to make satisfaction for it, and the *judex* or *judicial power*, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy.

When the defendant *appears*, or *puts in bail* to On appearance, the action, or becomes a prisoner at the suit of the plaintiff, then follow the pleadings, which are the mutual altercations between the plaintiff and defendant; the skill of which is the truest guide to the knowledge of the common law, and the surest introduction to the practice of it. It is a key that opens its inmost recesses, and an expositor that discloses and explains the most abstruse parts of it; the want whereof, says Lord Coke, causes great expence to the parties, as well as trouble to the judges. It is requisite as well for forms as for substance; for without observance of forms, there would be confusion. Co. Lit. sect. 534. The greatest and ablest men in the law have excelled in this science; their reputation, acquisitions, and dignities, have been principally owing to their skill in it: and

Lord *Mansfield* gave sanction to the excellency of special pleading as *flowing from the justest rules of logic, and including in it the most accurate, concise, and close manner of reasoning*; by which the most intricate and complicated train of facts, which would otherwise confound and embarrass the understanding of the most sensible jury, are reduced to *one single, plain, clear point*; unmixed with any foreign useless matter to carry off their attention from the true question under their consideration, or to perplex their minds in the judgment they are to form of it. This is the true use of special pleading; and, when *rightly and honestly applied*, is certainly the best contrived of all legal institutions to *determine the mere right in all judicial decisions*. *Ipsius legis viva vox. Co. Lit.*

115 b.

Two parts of pleadings.

There are two parts of pleadings, *viz. regular, and irregular, or collateral*. The regular parts are, 1. The *count or declaration*. 2. *Bar or plea*. 3. *Replication*. 4. *Rejoinder*. 5. *Surrejoinder*. 6. *Rebutter*. 7. *Surrebutter*. And if issue be not joined upon any of these, or mis-joined, or any of the pleadings hath been ill or vicious, or part of the matter contained in the plaintiff's suit is omitted to be answered, the court will award, 8. *a Repleader*; but not after demurrer, except in special cases. Of these, those *by which the plaintiff prosecutes his suit*, are, 1. *Declaration*. 2. *Replication*. 3. *Surrejoinder*. 4. *Surrebutter*. And the pleadings made use of by the adverse party for his defence are, 1. *Bar or plea*. 2. *Rejoinder*. 3. *Rebutter*; and as the court may award, 4. *Repleader*.

The irregular or collateral parts are, 1. *Demurrers to any part of the pleadings above mentioned*. Or, 2. *Demurrers upon evidence given at trials*. 3. *Pleas to entries of writs of scire facias*. 4. *Bill of exceptions to verdicts*. 5. *Pleas to entries of writs of error*.

But some take pleadings to be only what comes after the declaration, (*viz.*) what is contained in the bar, replication and rejoinder, contrary to the sentiments of the ancients, who reputed the count or declaration, and all acts entered upon record relating to plaints, suits or actions before the same, as well as those after, to be pleadings mentioned by *Littleton* in his tenures, and allowed in all ages, *viz.* 1. *To the jurisdiction of the court.* 2. *Pleading to the person of the plaintiff.* 3. *To the count or declaration.* 4. *To the writ.* 5. *To the action of the writ, and in bar of the action.* The 1st, 2d, 4th and 5th pleas must undeniably be said, to be pleadings before the declaration.

The count or declaration, anciently called the Declaration, *tailé*, must be *formal*, and contain, 1. The plaintiff and defendant's names. 2. The nature of the action. 3. Time, place, and act; in which ought to be comprehended how and in what manner the action did accrue or first arise between the parties, when, what day, what year, and what place, and to whom the action shall be given; which is called the declarative part of the count. 4. The summing up of the grievance or conclusion, which is *unde deterioratus est*, &c. In which, the plaintiff ought to aver and profer to prove his suit, and shew the damages he hath sustained by the wrong and injury done unto him by the defendant; and the conclusion is in these words, "*and thereupon he brings suit*," &c. (a) and at the end are added the plaintiff's common pledges of prosecution, (if the proceeding be by bill in either count,) *John Doe* and *Richard Roe*, which are now mere names of form, though formerly they were of use to answer to the king for the amercement of the plaintiff in case he were non-suited, barred of his action, or had a verdict and judgment against him. 4 *Inst.* 189.

(a) By which words, suit or *secta* (*a sequendo*) were anciently understood the witnesses or followers of the plaintiff; the actual production of which, are now antiquated and totally disused.

Declaration
what.

A declaration is the setting forth, comprizing or exhibiting in writing, the cause of action in any suit or plaint, grounded upon the common or statute law, wherein the party supposeth himself to be injured. In a real action it is termed a count, in personal and mixed actions, a declaration; count from the *French*, and *narratio* in *Latin*. *Co. Lit.* 17. a.

Why declaration
ought to be
plain and cer-
tain.

The declaration ought to be *plain and certain*, because it compels the defendant to make answer to it, otherwise the jury would be at a loss in giving their verdict, and the court be uncertain in giving their judgment; for *all* depend on the *certain*ty and *sufficiency* of the declaration. And the plaintiff in his count must *entitle himself to his action*; for he is to recover *by the validity of his own title*, and not by the weakness of the defendant's. *Vaugh.* 8. 58. *Doct. pl.* 84. *Co. Lit.* 17. a. *Plow.* 84.

Three kinds of
certainty.

Lord Coke says, that there be *three* kinds of certainties. *First*, To a common intent, and that is sufficient in bar, which is to defend the party and excuse him. *Secondly*, A certain intent in general, as in counts, replications, and other pleadings of the plaintiff; that is, to convince the defendant. *Thirdly*, A certain intent in every particular, as in estoppels. *Co. Lit.* 303. a. *Seet.* 534.

Not to contain
scandal and im-
pertinence.

But the declaration ought not to contain scandal and impertinence: as where, in assumpsit for a surgeon's demand for curing the defendant of the foul disease; in every count it was laid to be for curing him of the foul disease. The court expressed great displeasure, and said, that whenever the like was inserted, they should direct the prothonotary to tax exemplary costs. *Anon. C. P.* 2 *Wils.* 20.

When two writs
unnecessary.

So the court held, that where the plaintiff might have comprised *both* his causes of action in the *same* declaration, it was oppressive to sue out two writs at the same time; and made plaintiff pay costs and consolidate. *Cecil v. Briggs*, 2 *Term. Rep.* 639.

The

The next thing is the defendant's *plea* or *bar*: Of the plea or bar, *Pleas* are variously distinguished; the more general decision of them is that of being *dilatory* or *peremptory*: or they are, *first*, pleas in abatement; *secondly*, such as suspend the action; or, *thirdly*, such as bar the plaintiff for ever. And as the *declaration* must set forth all essentials necessary to maintain it, so the defendant's *bar* must be substantially good and certain, with an avoidance of the plaintiff's demands, which the plaintiff may traverse, and thereon go to issue.

The *Replication* is the plaintiff's answer to the Replication, &c. defendant's plea, which fortifies and supports his declaration: the *rejoinder* is the defendant's answer thereto; so of *surrejoinders*, *rebutters*, *surrebutters*, &c. in which the material thing is, *that they pursue what hath been at first alledged and insisted upon*, otherwise it will be a departure in pleading; as if a matter be pleaded at common law, this cannot be maintained by a custom; as in covenant on an indenture of apprenticeship to serve seven years, the breach assigned was, that he did not serve, &c. The defendant pleaded infancy; the plaintiff replied the custom of *London*, and adjudged a departure. So an action at common law cannot be made good in the replication by an act of parliament; but if one pleads a statute, and the other says it is repealed, he may reply, that it is revived by another, for this fortifies the first matter.

When the plaintiff replies, surrejoins, &c. and it thereby appears that he has no cause of action, he shall never have judgment, though the bar or rejoinder be insufficient; nor can any admittance of the adverse party make it good, for the court ought to judge on the whole of the record; as in debt on bond for performance of covenants, the defendant pleads performance generally, where some of the covenants are in the negative, whereby his plea is insufficient: if the plaintiff reply and shew a breach, which of his own shewing is no breach, judgment shall be given against him; for

When plaintiff replies, and it appears that he has no cause of action, he shall not have judgment, though the bar or rejoinder be insufficient.

on

on the whole record it appears he has no cause of action. 8 Co. 133. b.

But if bar be insufficient in substance, &c. and plaintiff shews no matters explanatory, the declaration being good, plaintiff shall have judgment for the insufficiency of the bar.

But if the bar be insufficient in substance, or amounts to a confession of the point of the action, and the plaintiff in his replication shews no matter against himself, but matter explanatory, or perhaps not material, the declaration being good, the plaintiff shall have judgment for the insufficiency of the bar, without any regard to the replication; as if the defendant plead a grant by letters patent in bar, which are not sufficient, yet the plaintiff in his replication shews another cause in the said letters patent, which is not material, the defendant demurs, the plaintiff shall have judgment. 8 Co. 133. b. 9 Co. 110. 3 Lev. 244.

If plaintiff makes title in his replication, but does not plead as he ought, &c.

If the plaintiff makes a title in his replication, but does not plead as he ought, especially in point of trial, the rejoinder admitting this, and tendering issue upon another matter, makes it good. Lev. 195.

The order of pleading.

The order of pleading is, 1. *To the jurisdiction of the court.* 2. *To the person of the plaintiff, and next of the defendant.* 3. *To the count or declaration.* 4. *To the writ.* 5. *To the action of the writ.* 6. *To the action itself in bar thereof.*

This has been settled as the most natural order of pleading, because by this order, each subsequent plea admits the former; as where the defendant pleads to the *person* of the plaintiff, he admits the jurisdiction of the court; for it would be nugatory to plead any thing in that court that has no jurisdiction in the case. When he pleads to the *count* he allows that the plaintiff is able to come into that court to implead him, and that he may there be properly impleaded; but, in pleading to the count, he does not admit the writ to be good, yet if the count be vicious, the writ is consequently destroyed; for though the writ in itself may be good, yet it is ill pursued: but in pleading to the *writ* he admits the count to be sufficient in form, if the writ be good; since it is not to any purpose to

to object to the form of such writ, if the form of the count be thereupon insufficient; but if the count be in substance variant, the defendant may shew it any time in arrest of judgment, because the court has no authority to proceed in a matter of substance different from the original writ. *Co. Lit.* 303. *Hob.* 71, 72. *Latch.* 178. 5 *Mod.* 146.

If a man pleads to the action of the writ, he allows both the form of the count and of the writ; for he admits, that if the form of the writ and count were adapted to the plaintiff's case, that such form is good and sufficient; since to object to the action not agreeing with the plaintiff's case does admit, that if it be ruled by the court that it does, that the plaintiff has before the court a count in form sufficient. Plea to the action of the writ admits the count and writ in form.

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he answers to the right in demand, and puts that right in issue, and thereby admits, that there is a sufficient form to put it in issue; and therefore, though a man pleads *non assumpsit modo et forma*, yet the *modo et forma* does not traverse the form of the writ or count, but the substance of the promise; which is the true reason why another promise may be given in evidence different in time and place from that mentioned in the declaration, though not different in substance. If defendant pleads in bar to the action, he admits the form of the writ and count.

Lord Mansfield says, "I have always thought and often said, that the *rules of pleading* are founded in good sense. Their objects are *precision* and *brevity*." Nothing is more desirable for the court than *precision*, nor for the parties than *brevity*. It is easy for a party to state his ground of action. If it is founded on a deed, he needs not set forth more than that part which is necessary to entitle him to recover. *Cow. Rep.* 665. If he states what is *impertinent*, it is an injury to the other party, and may be struck out, and costs allowed upon motion. *Ibid.* 727. Rules of pleading founded in good sense; their objects, precision, and brevity. Costs for impertinent matter.

Of the Declaration.

The declaration,
foundation of
the suit.

The declaration is the foundation of the suit, in which are to be considered principally, *first*, the parties who must be *competent persons to prosecute*, and be made defendant in the action, and they must not be under *any legal disability or restraint* in that behalf. *Secondly*, The cause or matter of complaint, and how, and in *what manner it arose*; and it ought to be *clear*, and the *charge certain*, to which the defendant may give a direct answer, and immediately plead to issue thereon. *Thirdly*, the *time and place* (b) where the injury was, or is said to be committed, or debt contracted. *Fourthly*, it ought to shew *a breach of the promise, &c.* on which the action is founded; and if a good breach be not assigned, the defendant may demur generally. *Winch. 120.*

Persons who
cannot maintain
actions.

Persons who cannot legally maintain an action are said to be *men outlawed* in an action or indictment, an *alien born* out of the ligeance of the king, persons *convicted upon a writ of præmunire facias, attainted of high treason*, (formerly *professed in religion*,) or persons *excommunicated* by law of holy church; so long as these impediments remain, they cannot maintain a declaration. *Co. Lit. 135. b.*

Others.

But all others, whether *men or women, idiots, lunatics, deaf or dumb*, may maintain a declaration. *Ibid.*

Before I proceed further, it may be necessary to shew the reason why the above persons are disabled to maintain actions; and, first, with respect to *persons outlawed*:

Why persons
outlawed, &c.
cannot sue.

With respect to persons *outlawed*, the disability is only when *they sue in their own right*; for if they

(b) This is to be understood of personal actions; for in real actions it is not usual to count of the year, day, and place. *Bro-Cont. 59.*

sue in *auter droit*, as *executor* or *administrator*, or as *mayer* with his *commonalty*, it shall not disable him, because the person whom he represents has the privilege of the law. *Co. Lit.* 128. *a.*

Excommunicated persons cannot maintain an ac- Persons excom-
municated.
tion (as *executors*, &c.), for an *excommunicated* person is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses; but the outlaw, though incapable of law for his own benefit, may be allowed to do all charitable actions for the soul of the deceased; and it is one of the effects of excommunication, that he cannot be procurator or attorney for any other person, and therefore cannot represent the deceased. *Co. Lit.* 134. *a.*

An alien, which is born out of the ligeance of Alien.
our king, shall not sue in any action *real* or *personal*, *Lit. sect.* 198. With respect to actions personal Lord Coke says, "The law doth distinguish between an alien that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king;" and true it is, that an *alien enemy* shall maintain neither *real nor personal actions*, *donec terræ fuerimus communio*, that is, until both nations be in peace. But an *alien in league* shall maintain *personal actions*, or else he would be incapable to merchandize; but *no real or mixed action*, because there is no necessity that he should settle. *Co. Lit.* 129. *b.*

As the law allows an alien enemy to be an exe- Alien executor.
cutor, and possess the effects of the testator, as well as an alien friend, it must allow him power to recover, since that there is no difference, and by consequence he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the effects of the testator. *Co. Lit.* 129.

Popish recusancy convict, the plaintiff is disabled Popish recu-
sancy.
to sue by stat. 3 Jac. c. 5. except where he sues
for

for lands, tenements, leases, annuities, rents, and hereditaments, or for the issues and profits thereof, which are not to be seized into the king's hands, his heirs or successors. 3 *Lev.* 2.

Lord Coke says, he that is abjured the realm may be disabled; for that he is *extra legem*, and yet he is not properly outlawed. *Co. Lit.* 128. *Britton.* 39.

Persons convicted of *præmunire*.

A person who has judgment given against him upon a writ of *præmunire facias*, &c. is out of the king's protection: if he sue any action and the tenant or defendant shew *all the record* against him, he may ask judgment if he shall be answered, for the law, and the king's writs, be the things by which a man is protected and holpen; and so, during the time that a man in such case is out of the king's protection, he is out of help and protection by the king's law, or by the king's writ. *Lit. sect.* 199. Lord Coke says, "There be three things whereby every subject is protected, viz. *rex, lex, et rescripta regia*—the king, the law, and the king's writs. The law is the rule, but it is mute; the king judgeth by his judges, and they are the speaking law *lex loquens*; the process and the execution, which is the life of the law, consisteth in the king's writs: so as he that is out of the protection of the king cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, & lex tuetur jus*, 130. *a.* The judgment in a *præmunire* is, that he shall be out of the king's protection, and his lands, &c. goods and chattels forfeited, and his body remain in prison at the king's pleasure. *Vide 3 Inst.* 126.

High treason, &c.

Besides men attainted in a *præmunire*, every person that is attainted of high treason, petit treason, or felony, is disabled to bring an action; for he is *extra legem positus*, and is accounted in law *civilliter mortuus*. *Co. Lit.* 130. *a.*

Professed in religion.

When a man entereth into religion, as into the order of St. *Bennet*; &c. and is there a monk professed, or into the order of friars, minors, or preachers,

preachers, and is there a brother professed, he is absolutely dead in law, and his next heir shall have his estate, *Lit. sect.* 200. ; for such a monk, upon his profession, renounces solemnly all secular concerns. And besides, as the popish clergy claimed an exemption from the duties of civil life, and the commands of the temporal magistrates, the genius of the *English* law would not suffer those persons to enjoy the benefits of society who secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*, and when entered into religion might, like other dying men, make his testament and executors ; or if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead and intestate. And such executors and administrators had the same power, and might bring the same actions for debts due to the religious, and were liable to the same actions for those due from him, as if he were naturally deceased. Nay, so far has this principal been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in the process of time was himself made abbot thereof, here the law gave him in the capacity of abbot an action of debt against his own executors to recover the money due. *Co. Lit.* 133. But even in the times of popery, the law of *England* took no cognizance of *profession* in any *foreign country*, because the fact could not be tried in our courts, *Co. Lit.* 132. ; and therefore since the *reformation*, the disability is held to be abolished. 1 *Salk.* 162.

There was a time Lord *Coke* says, “ when *idiots, madmen*, and such as were *deaf and dumb* naturally, were disabled to sue, because they wanted reason and understanding :” but at this day they all may sue, for the suit must be in their name ; but it shall be followed by others. *F. N. B.* 27. b. When an idiot sues or defends, he *Idiota.*
E shall

shall not appear by guardian, prochein amy, or attorney, but he must be ever in person. *Co. Lit.* 135. b. And the stat. of *West.* 2. c. 15. extends not to an idiot, 2 *Inst.* 390. But otherwise of him who becomes *non compos mentis*; for he shall appear by guardian if within age, or by attorney, if of full age. 4 *Co.* 124. b. 2 *Saund.* 235.

What an idiot is.

An idiot is a fool or madman from his nativity, and one who never has any *lucid intervals*; therefore the king has the protection of him and his estate during his life, without rendering any account; because it cannot be presumed, that he will be ever capable of taking care of himself or his affairs. And such a one is described *a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.* *Vide Co. Lit.* 247. b.

What not.

A man is not an idiot if he hath any glimmering of reason, *F. N. B.* 133. so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot, *Co. Lit.* 42. he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

Lunatic.

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is, indeed properly, one that has *lucid intervals*; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name) are comprised, not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. 1 *Inst.* 247. a. To these also, as well as ideots, the king is guardian, but to a very different purpose: for the law always

1 *Inst.* 246.

always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for those unfortunate persons to protect their property, and to account to them for all profits received if they recover, or, after their decease, to their representatives. *Vide* 17 *Ed.* 2. c. 10.

An infant cannot be sued but under the protection and joining the name of his guardian, for he is to defend him against all attacks, as well by law as otherwise, *Co. Lit.* 135. 1 *Black. Com.* 464.; but he may sue, either by his guardian or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause.

A *feme covert* must sue with her husband if she be injured in her person or her property, *Salk.* 119. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. 1 *Leon.* 312. In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in the action, as in recovering debts due to the wife *before marriage*, in actions relating to her freehold or inheritance, or injuries done to the person of the wife. *Roll. Abr.* 347. The husband and wife shall both be sued for all her torts and trespasses during coverture. *Co. Lit.* 133. 351. 2 *Lev.* 145. The dippers of *Tunbridge Wells* joined with their husbands, and held well. 2 *Wils.* 406.

A husband who has abjured the realm, or who is banished, is thereby *civiliter mortuus*, and being disabled to sue, or be sued in right of his wife, she must be considered as a feme sole; for it would be unreasonable that she should be remediless on her part, and equally hard on those who had any demands on her, that, not being able to have any redress from the husband, they should not have any against her. *Co. Lit.* 133. a. See a particular case, 12 *Mod.* 603. A feme covert living

When may sue
and be sued
without husband.

apart from her husband, and having a separate maintenance, may contract and be sued as a feme sole. 1 *Term. Rep.* 5.

Executors.
9 *Rep.* 37.

Executors, when they sue, are *all to be named*; but when an action is to be brought against them, it must be only against *such as have administered*.

Tenants in common.

In *real actions*, and in actions also that are mixed with the personalty, tenants in common shall sever in action, because they have several freeholds, and claim by several titles, *Co. Lit.* 195. *b.*; but in *personal actions* they shall sue jointly in all their names for trespass or of offences which concern their tenements in common, and shall recover jointly. *Ibid.* 198. *a.* Joint-tenants of lands or goods must jointly implead, and jointly be impleaded by others. *Ibid.* 180. *b.*

Joint-tenants.

Queen.

By the common law the wife of the king of *England* is an exempt person from the king, and may sue and be sued without the king; for the wisdom of the common law would not have the king, whose care is for the public, to be troubled and disquieted for such private and petty causes, therefore she is to sue and be sued as a feme sole. *Co. Lit.* 133. *a.*

Joinder in action by persons.

Divers persons may have trespass jointly for goods taken from them; but in battery or personal trespass, they ought to separate. Nor can two plaintiffs sue in one action for several causes, though the causes are of the same kind; and two persons may not join in one writ to sue on two bonds for a debt due to them separate and apart, or sue one man for a trespass done to them severally. But one plaintiff may join two debts due to him from one defendant, as debt upon two bonds, &c. 1 *Vent.* 366. 1 *Salk.* 10.

If trespass be committed by several.

If one trespass be committed by divers persons, the plaintiff may make it joint or several, as he pleases; and if they be sued in one action, they may sever in pleas and issues. But a release to *one* is a release to *all*; but the jury must assess damages for all (on each of them who is answerable for

for the other), but there shall be but one satisfaction. And where a joint action lies against several, and some are known and some not, the action may be brought against them that are known by their particular names, and the declaration may be with a *simul cum aliis*, &c. 2 *Lev.* 101. 3 *Lev.* 74. 99.

Chose in action is a thing incorporeal and only in *Chose in action*. right : as where a man hath cause, and may bring an action for some debt or duty due to him, as a right or title of entries into land, and action of debt on obligation, or an annuity, or for rent, &c. these are called things in action.

Money due on a bond is a chose in action, for Money due on a property in the debt vests at the time of forfeiture mentioned in the obligation; but there is no possession till recovered by course of law. If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action; for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be can only be ascertained by verdict, and the possession can only be given me by legal judgment and execution. *Fl.* 41. 152.

A possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law; for if this were permitted, it would promote maintenance, and prove prejudicial to such as, being able to contend with those with whom the original contract was, might find themselves depressed by a powerful adversary, *Co. Lit.* 214. which the common law forbids. *Ibid.*

But though a bond, being a *chose in action*, cannot be assigned over so as to enable the assignee to sue in his own name, yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. *Ibid.* 232.

The form of assigning a chose in action is in the nature of a declaration of trust, and an agreement

What title an assignee has.

What cannot be granted or assigned.

What title an assignee has.

Assignee rather than an attorney to assignee.

The king may assign.

Equity will protect an assignment of a chose in action.

Of joinder in action.

to permit the assignee to make use of the name of the *assignor*, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the *original creditor's name*; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a chose in action by assignment, *Dy. 30.*: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a chose in action, as much as the law will that of a chose in possession. *3 P. Wms. 199.* If the obligor, *after notice* of the assignment, pays the money to the obligee, he will be compelled to pay it over again. *2 Vern. 540.* But payment *without notice* is good. *Chan. Caf. 232.*

In actions upon contract, the plaintiff may join in the same writ different causes of action in assumpsit, or in covenant, debt or detinue, *1 Wils. 248.* and he may join debt and detinue in the same writ. *2 Wils. 319. 3 Wils. 348. 1 T. Rep. 274.*

The true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment in both, and not whether they both require the same plea; and wherever there is the same judgment, they may well be joined. *Dickon v. Clifton. 2 Wil. 319. L. C. J. Wilmot.* Case for misfeasance and negligence may be joined with trover. *Ibid.* Debt on an obligation and a mutuatus, *1 Wils. 250.* So debt and detinue may be joined, because there are writs in the register in which both are comprised in the same writ. So debt on a lease and for cloaths. So debt for an amercement in a court leet and a mutuatus. *2 Salk. 772.* But debt and account, or debt and trespass, cannot be joined. Assumpsit and trover cannot be joined; for the mutuatus was turned into the assumpsit, yet it is still

fill in the contract, and different in its nature from a tort. *Ray*, 233. 3 *Lev.* 99.

In *Mast v. Goodson*, the court said, that the rule laid down in *Dickon and Clifton* is rather too large, and is not universally true, though it may be one good rule or test among others to try this point by, 3 *Wils.* 354.; and held, that a count, founded upon a tort, and trover may be well joined. *Ibid.* But an assumpsit for goods sold, money lent, &c. cannot be joined with a count grounded upon a tort or misfeasance, as trover is. *Ibid.*

Rule in *Dickon* and *Clifton* too large.

Lord Chief Baron Gilbert says, "One reason of joining actions seems to be where the process, and the fine upon the original, are of the same sort:" for in debt the old process was, *summons*, *attachment*, and *distress*, and, on taking out the original, a fine was paid to the king, which was in proportion to the sum demanded; but in trespass the process was a *capias*, because the man that had committed the tort, might be supposed to fly from justice. And in this action the court set a fine on him in proportion to his offence, and levied it by a *capiatum*. 1 *Vent.* 366. *Gilb. C. P.* 7.

Several trespasses may be joined, because they are comprised in one writ, and so several actions on the case, where the case is of the same kind, may be joined; as an action for fraud on the delivery of goods, and on the warranty of the same goods, being both on the contract. So against a common carrier on the custom of the realm and trover, because both on the tort, it being a violation of them not to deliver the charge. *Ld Raym.* 58. 1 *Vent.* 365. 223. *Gilb. C. P.* 6. *Vide* 2 *Salk.* 636. 1 *Str.* 621. 2 *Burr.* 753. 1 *Salk.* 206. *Allyn.* 9. 2 *Lut.* 1249. *F. N. B.* 89.

Several trespasses may be joined.

It is a general rule in pleading, that the declaration must shew a title in the plaintiff; and that it is regularly true, that if the plaintiff will discover to the court any thing whereby it may appear that he had no cause of action when he commenced it, his writ shall abate. *Hob.* 199. *Palm.* 524.

Respecting the cause of complaint, &c.

Therefore in actions of *assumpsit*, the plaintiff must not only shew that the defendant is *indebted*, but also for *what he is so indebted*. *Hob. 5. God. 176.* So if the defendant receives monies of several persons to the use of the plaintiff, he may state this without shewing of *what persons in particular he received the money*, *Moor. 854.* and the whole promise should be set forth. *Allen. 5. March. 100.*

And although the plaintiff must set forth every material thing in his declaration, and without he could not be entitled to his action, yet the law requires no greater certainty than the nature of the thing is capable of; and therefore if the contract be made in *general terms*, the declaration may be made upon the same terms, 3 *Lev. 319.* as in *assumpsit* for work and labour generally, without stating what sort of work: the court will hold the declaration well enough. *Carth. 276. Vent. 44.*

As to the day laid in the declaration.

With respect to the time of laying the action. In debt upon *bond, bills, notes, or other contract or engagement*, wherein the day can with certainty be ascertained, it is necessary such particular day be stated in the declaration; but in actions on the *case, trespass, assault, battery, &c.* it is in general sufficient to state the cause of action to have arisen before the commencement of the suit, and within the time limited for bringing such action: and it is with great reason this is allowed, as, in some cases, it may be impossible for a plaintiff to ascertain the day by evidence.

As to venue, its origin.

With regard to the place where the injury was committed, it must be observed, that originally all actions were tried in the proper counties in which they arose, pursuant to *maxime vicini vicinorum facta præsumuntur scire*. This created no inconvenience; for all men being anciently in *decenna*, they were easily come at, the *decenna* being responsible for their appearance; but when the custom of the decennary began to wear off, men used to fly from their creditors, and this begot the distinc-

distinction between *local and transitory actions*: the *first* relating to lands, which must be tried where the lands lie; the *other*, a debt or duty adhering to the person wherever he fled. Hence men omitted to date their contracts from any certain place, and began their obligations with a *neverint universi*. When this distinction was established, it began to be abused to a great degree; for plaintiffs would lay their actions far from the place where the fact was done, and the defendants, for fear of being outlawed, were necessitated to carry their witnesses into that county, how far so ever remote from the place where the fact was done. To remedy this,

The stat. 6 R. 2. c. 2. provides, that to the intent that writs of debt and of account, and all other such actions, be from henceforth taken in their counties, and directed to the sheriff of the county where the contracts of the same actions did arise, it is ordained, *that from thenceforth on pleas on such writs, when it shall be declared that the contract thereof was made in another county than is contained in the original writ, that then incontinently the said writ shall be abated.*

The statutes ordering all actions to be laid in their proper counties.

This was intended to have confined all actions to their proper counties; but as it would have created greater mischief than it was intended to prevent if a creditor could not follow his debtor into another county, and as the statute is so worded that it only prescribes that *the declaration shall agree with the writ as to the place*, the judges construed it so as to empower them to *change the venue*, and thereby oblige the plaintiff to give evidence of the fact within the county where the writ is brought; and this, in effect, tends to abate the writ according to the statute. And this power is discretionally exercised, so as not to cause but prevent a defect of justice. *Vide 2 Salk. 670.*

Explanation of the Statute.

While the process was by attachment and distress, which could be only where the defendant's goods were, it begat a distinction between actions; the

Distinction of actions.

the one called *local*, because it related to lands, and the process was to be on the lands; the other was called *transitory*, which related to goods and chattels, and was to follow the defendant wherever he could be found.

Local actions.

All actions *real* or *mixed*, as *trespasses*, *quare clausum fregit*, *ejectment*, *waste*, &c. must be laid in the county where the lands lie. *Bratt.* 189, 414.

6 *Mod.* 194.
Carth. 182.

In an action on a lease for rent founded on the privity of estate, as in debt by the assignee, 1 *Wils.* 165. or devisee, *W. Jon.* 43. of the lessor against the lessee, or by the lessor, or his personal representatives, 6 *Mod.* 194. *Latch.* 197. against the assignee of the lessee, or against the executor of the lessee in the *debet* and *detinet*, 2 *Lev.* 80, or in covenant by the grantee of the reversion, against the assignee of the lessee, 1 *Salk.* 80. the action is local, and the venue must be laid in the county where the estate lies. And if laid elsewhere, the defendant may demur to the declaration, 1 *Wils.* 165. or the plaintiff on the general issue will be nonsuited. *Cowp. Rep.* 410. 2 *Black. Rep.* 1033. Debt upon escape is also local, 2 *Lill. Abr.* 782.; so nuisance, *Cro. Car.* 133.

Transitory actions.

In personal actions, as *debt upon bond* or *mutuatus*, &c. *detinue*, *assault*, *deceit*, *trover*, *account*, *slander*, and the like, for rent founded on the privity of contract, as in debt by the lessee, or his executor in the *detinet* only, 2 *Str.* 776. *Gilb. C. P.* 91. or in covenant by the lessor, 3 *Lev.* 154. or grantee of the reversion, 1 *Wils.* 165. against the lessee, the action is transitory, and the venue may be laid in any county at the option of the plaintiff, subject to its being changed in the very county where the action arose. So against a sheriff for a false return. 1 *Wils.* 136. If a personal action be founded upon a thing done out of the realm, it may be brought in any county. *Salk.* 660. So on a bond. 659 *Cow. Rep.* 178. 181.

Out of the
realm.

If founded on two things in different counties, ^{If founded on two things.} both material to the maintenance of the action, it may be brought in either. 7 Co. 2. Salk. 669. 1 Lev. 114. 2 Mod. 23. 7 Co. 1. b. Cro. Eliz. 574. Hob. 209.

There are, however, some actions of a *transitory* ^{Penal statutes, nature, wherein the venue must be laid in a parti- &c.} *cular county*. Such are all actions upon *penal statutes*, 21 Jac. 1. c. 4. s. 2. and actions upon the case, or trespass against justices of peace, mayors or bailiffs, or cities or towns corporate, beadboroughs, portreves, constables, tithingmen, churchwardens, &c. or other persons acting in their aid and assistance, or by their command, for anything done in their official capacity, 21 Jac. 1. c. 12. s. 5.; and also actions against any person or persons for any thing done by an officer or officers of the excise or customs, 24 Geo. 3. sess. 2. c. 47. s. 35. or others acting in his or their aid, in execution or by reason of his or their office. In these actions, the venue, by various acts of parliament, must be laid in the county where the facts were committed, and not elsewhere. On the other hand, the venue in a transitory action is, ^{Venue in transitory actions in some cases optional.} in some cases, *altogether optional* in the plaintiff; as where the action arises in *Wales*, 2 Str. 1238. or beyond sea, Cow. 176. or is brought upon a bond, or other specialty, 2 Str. 878. promissory note, or bill of exchange, 1 Term Rep. 571. for *scandalum magnatum*, Salk. 668. or a libel dispersed through the kingdom, 1 Term Rep. 647. 3 T. R. 306. 652. against a carrier or lighterman, Salk. 670. for an escape, *ibid.* or false return, 2 Str. 727.; and, in short, wherever the cause of action is not *wholly* and necessarily confined to a single county. 2 Salk. 669. 2 Term Rep. 275. In these cases the venue cannot be changed by the court but upon a *special ground*. 1 Term Rep. 781.

A serjeant at law, attorney, or other privileged ^{Serjeant at law, &c.} person, whose attendance is necessary at *Westminster Hall*, may lay his action (if transitory) in *Middlesex*,

sex, tho' it accrued in another county. *Salk.* 668. 670. 4 *Burr.* 2450. But if they be sued, and the action laid in the *right county*, court will **not** change it. 2 *Ld. Raym.* 1053. If a privileged person sues in *auter droit* as executor, or jointly with another, his privilege is lost. 4 *Burr.* 2027.

Specialty.

If the action be grounded on a specialty, the court will not change the venue. 2 *Mod.* 228. *Lev.* 307.

As the original writ should be directed to the sheriff where the action is brought and intended to be tried, the venue should be laid in *that county*. If the action be *local*, the venue must be laid in the county where the cause of action arose. In *transitory actions*, it may be laid in *any county*. So is the venue by bill. The county in the margin will help, but not hurt. Hence if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the word in the margin will not vitiate it. *Cas. Temp. Hard.* 343.

Court will not change venue to any of the four northern counties.

The court will not change the venue to any of the four northern counties previous to the Spring circuit, because there the assizes are holden on'y once a year at the time of the Summer circuit; and it will sometimes remove the venue from the proper jurisdiction, (especially of the narrow and limited kind,) upon a suggestion duly supported, that a fair and impartial trial cannot be had therein. *Str.* 874. *Cow. Rep.* 510. 1 *Term Rep.* 363.

Lastly, in respect to the damage which the plaintiff declares himself to have sustained, there is no particular rule to direct the *quantum* thereof, and the plaintiff need only be careful that he *make it sufficient* to carry the verdict found by the jury. In all actions on the *case*, *trespass*, *assault*, &c. the whole sum found due are assessed by the jury passing under the denomination of *damages*: but if the jury find *more damages* than are laid in the declaration (unless the plaintiff remits the surplus on the roll), it is error, and such remittitur must be entered

tered *before the writ brought*, or must pay costs *previous to the amendment*.

In actions of *account, annuity, covenant, debt, detinue and replevin*, frequently the plaintiff proceeds, in the first instance, by *original writ*, which is called a *præcipe*, by which the defendant has an option given him either to do what he is required, or shew cause to the contrary; but in *assumpsit* and *actions for wrongs* it is called a *pone*, or *si te fecerit securum*, by which the defendant is required to shew cause in the first instance, *Finch. 257*. In point of *form*, the *original writ* is *special*, or *general, nominatum vel in-nominatum*, *Gilb. C. P. 7*. In actions of *account, annuity, covenant, debt, detinue and replevin*, as also *trespass quare clausum fregit*, the writ contains only a *general complaint*; but the *declaration* is an *exposition of the writ*, and *adds time, place, and other circumstances*, so that it may be tried. *Co. Lit. 303. 17. a*. But in actions of *assumpsit*, and actions *on the case*, the declaration states, that the defendant *was attached to answer* the plaintiff in the plea, stating *the whole original writ verbatim*, to the damage of the plaintiff, adding these words, *and therefore he brings his suit, &c.* And in the formal part of the declaration in *account, annuity, covenant, debt, detinue and replevin*, the declaration states that the defendant was *summoned to answer*; but in *trespass quare, &c. ejectment, &c.* it begins with the defendant being *attached to answer, &c.* and such declaration by original, should be entitled *the term the original is returnable*: and in the *king's bench* the *venue* must be laid in the *same county* where the original was sued, *or the bail will be discharged*, tho' it will still be good as to the defendant. *3 Lev. 235*. In the *common pleas* it is otherwise. *R. Hil. 22 Geo. 3*.

If the original be *general*, as where a *statute* gives an action, but does not prescribe any form of the writ, the writ framed by the *common law* will serve, and the *special matter* may be set forth in the *declaration*. *Doctr. Pla. 84*.

In

In actions by original declaration not to repeat the original writ.

In all actions by original it was formerly usual for the declaration to repeat the *whole* of the *original writ*. But this practice being productive of great and unnecessary prolixity, a rule of court was made, that the declarations in *actions upon the case*, and *general statutes*, other than debt, repeat not the original writ, but only the *nature of the action*, as that the defendant was attached to answer the plaintiff in a plea of trespass on the case, or in a plea of trespass and contempt against the form of the statute. *R. M. 1654. f. 12.*

Declaration by bill is a mere copy of it, and should correspond with the process, names, &c.

Where process is issued by a wrong name, and defendant appears, how to declare.

The declaration upon the bill is a mere copy of it, and should correspond with the *process* in the *names* and *descriptions* of the parties; for if there be a *material* difference, the court will set aside the proceedings. But where process is taken out against the defendant in a *wrong name*, and he appears by his right name, the plaintiff may declare against him *by the name* in which he appears, stating, that "he was arrested, or served with process, by the other;" for by appearing, the defendant admits himself to be the person sued, and so the variance is immaterial. *3 Term Rep. 611.* But if he do not appear, the plaintiff cannot rectify the mistake, by appearing for him in *his right name*, according to the statute. *Ibid.*

But if he pleads may amend.

And if defendant pleads in abatement, plaintiff may amend his declaration by inserting *his right name*, on payment of costs, which is now done by summons.

On general process the plaintiff may declare *qui tam*, &c.

In either court, upon general process, the plaintiff may declare *qui tam*, or as *executor*, *administrator*, or *assignee*, *2 Str. 1232.* but this rule will not hold *à converse*; for where the process was to answer the plaintiff *qui tam*, &c. and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal. So where the process was to answer the plaintiffs as *assignees* of a bankrupt, and the declaration was in *their own right*; for the plaintiffs cannot declare generally on process

process sued out in a *special character*. *Meggs and Anr. assignees v. Ford*, E. 25 Geo. 3. B. R.

The declaration in the *king's bench* and *common pleas* are alike in *form and substance*, where the proceeding is by *original writ*.

But if the proceeding be by *bill*, the courts differ *if by bill, in form only*, both adding pledges of prosecution at the end.

In the proceeding by *original*, the *pledges* are returned on the original writ itself, therefore not necessary to be inserted in the declaration.

In the *king's bench* by *bill*, the plaintiff cannot *K. B. must declare against any one*, but in custody of the marshal, *Cro. Eliz.* 223. (except where the defendant is privileged, 2 *Saund.* 415. or be in actual custody of a sheriff or bailiff of a liberty or franchise, &c. 4 & 5 *W. & M.* c. 21. 1 *Wils.* 119. *Ld. Ray.* 1362.)

Where in *debt*, the declaration stated, *that defendant was attached* to answer, instead of *summoned*, *If in debt attached, instead of summoned, good.* it was held well on demurrer, as a *capias* lies in debt. *Str.* 225. *Rep. Temp. Hard.* 189. So determined in *Barnard v. Moss*, *Hil. Term* 1788. C. P.

Regularly, by the common law, every *natural man*, having no name of dignity, ought to be named in all originals, and other suits, by his *christian name* and *surname*; but if he be of the degree of a knight or baronet, he ought to be named by his *christian name* and *surname*, and by addition of his name of dignity, by the common law. 2 *Inst.* 665. As to names of men and titles.

If a man be created by letters patents *duke*, *If created a duke.* *marquis*, *earl*, *viscount*, or *baron*, the dignity is so incorporated to him, according to the state given unto him by those letters patents, as the *duke*, &c. by the common law might be named by his christian name, and by the name of his dignity, which standeth in lieu of his surname; as, *command John duke of Lancaster*, *ibid.* 166. and tho' a creation by writ

writ hath not the same words, yet it hath the same effect. *Ibid.*

The estates and degrees against whom *original writs* may be brought, are the *queen, consort of the king; the prince of Wales, dukes, marquisses, earls, viscounts, and barons.* These are of the greater nobility. 2 *Inst.* 666.

If one man be a duke, a marquis, &c. how to be named.

If one man be a duke, a marquis, earl, viscount, and baron, all these dignities stand distinctly in him, and the greater drowneth not the lesser, yet shall he be named in the original writs, &c. by the *worthier dignity*, by the name of *duke only*. 2 *Inst.* 669 (c). And in an original writ, a *duke* is named *Edward duke of Buckingham, late of N—*, in the county of *G—*; for always the estate and degree of *dukes, marquisses, &c.* is *first named*, as *duke of, &c.* and after the *town and county*. *Ibid.*

Knights.

Knights of *St. George*, knights bannerets, knights of the bath, knights of the chamber, *militis camerae*, knights bachelors, baronets, esquires, gentlemen. These are of the lesser nobility. 2 *Inst.* 666.

There are also names of worship, as *esquires and gentlemen*. *Ibid.*

The sons of all the peers and lords of parliament, in the life of their fathers, are, in law, *esquires*, and so to be named; and the eldest son of a knight is an esquire. *Ibid.* 667. Stat. 1. H. 5. c. 3.

Archbishops and bishops.

If the *archbishop* be sued, he is to be named *John lord archbishop of C.* or if a *bishop*, *John lord bishop of N.* but otherwise it is of a *parson*; for he must be named by his *christian and surname*, and may have the addition of *clerk*. 2 *Inst.* 666.

If a *duchess, viscountess, marchioness, baroness*, be sued, she will be entitled to that addition.

Esquires or *gentlemen* are not names of dignity, nor need a dignitary of another kingdom be named by that name; but if added, will not hurt: for

(c) A man may have inheritance in title of nobility and dignity three ways, by creation; descent, and by prescription. See *Lib. 1. c. 1.*

that

that they are not peers of our parliament. *Co.*

Lit. 16. a.

Persons who have taken any degree in *divinity* Clerks. may have the addition of *clerk*; or if he take any degree in either university, he may be named by that degree. 2 *Inst.* 668.

A corporation aggregate, as *mayor and commonalty*, Corporation aggregate. *dean and chapter*, *master of an hospital*, and *confreres*, gregate. &c. the mayor, dean, or master, need not be named by his *christian name*, because such a corporation standeth in lieu both of the *christian and surname*. 2 *Inst.* 666.

If there be a corporation of *one sole person*, that Sole. hath a *fee simple*, he may be named by his *christian name* without any *surname*, as *John bishop of N.* &c. *Ibid.*

If the plaintiff in any action shall be made a If plaintiff be made a peer pending action, no abatement. *duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, or serjeant* at law, depending the same action, such action shall not abate. *Stat.* 1 *Ed.* 6. c. 7. f. 3.

In every original writ of actions personal, &c. In original writs on which exigent shall be awarded, what addition necessary. and in which *exigent* shall be awarded, to the *names of the defendants in such writs*, &c. additions shall be made of their *estate, degree, or mystery*, and of the *towns or hamlets, or places and counties of the* which they were or be, and if omitted, the *outlawry thereon shall be void*; or the said writs may be abated by the *exception of the party*, provided that they be not abated for the *surplusage* of such additions. *Stat.* 1 *H.* 5. c. 5. *Latch.* 169.

It seems this statute extends only to *personal* Extends to personal actions. actions, wherein the defendant is to be outlawed, 2 *Inst.* 670.; it does not extend to a *real action*, or to a *recordari to remove the plaint*. 2 *Inst.* 665.

The addition of the *estate, degree, or mystery*, Addition of defendant ought to be as he was at time of writ purchased. Addition of defendant ought to be, as the defendant was of at the *day of the writ purchased*, and not with a *nuper*, as *nuper armiger, nuper monachus aut nuper comes de D.* &c.; but it is a good addition to name the party *late of* such a town, as of *London or Norwich*, so of such a *hamlet*,
* F

hamlet, or of the town, 2 Inst. 670. or of a place known by a special name out of a town or hamlet. 2 Haw. 189.

Divers trades.

If a man have divers arts, *trades, or occupations*, he may be sued by any of them, *2 Inst. 669. as taylor, merchant, husbandman, yeoman, labourer, and the like, ibid.*; but this means a *master of the trade*, and not a servant. *Ibid.*

If a knight be sued.

If the *lesser nobility* be sued, and all others under them, the *town and county are named before the addition*, as *Thomas C. late of D. in the county of M. knight*; or, *William D. late of D. in the county of M. baronet, &c. 2 Inst. 669.*

If defendant have a degree and a trade likewise, plaintiff may call him which he pleases. Therefore if he be a lime merchant, tho' he be sued as a yeoman, it will not abate the writ.

Every man, be he a trader or not, has a *degree* by which he may be denoted, and having a degree, if he has a trade likewise, it is in the election of the plaintiff to sue him by one or the other; and if he sues him by his degree, it is *not* enough for the defendant to say he is of such a trade, because he does not give the plaintiff a better writ. Therefore, where the plaintiff sued the defendant of such a place *yeoman*, and he pleaded that he was a *lime merchant*, the defendant not having shewn himself to be of a *degree higher than a yeoman*, the court awarded a *respondens ouster*; for the defendant should have shewn himself to be of a *degree higher than a yeoman. 2 Str. 556. Horspool v. Harvison, 2 Ld. Ray. 1541.*

Forms of the Courts.

By bill B. R.

Middlesex, to wit.
John Denn complains of
Richard Fenn, being in
the custody of the mar-
shal of the marshalsea
of our lord the now
king, before the king
himself, of a plea of
trespass on the case, *For*
that whereas (to the end
of the declaration); then
say, to the damage of
the said *John* of 500*l.*
and therefore he brings
his suit, &c. pledges to
prosecute *John Doe* and
Richard Roe.

By original C. P.

Middlesex, to wit. *Richard Fenn*, late of
Westminster in the said
county, yeoman, was at-
tached to answer *John*
Denn in a plea of trespass
on the case; and where-
upon the said *John*, by
S. B. his attorney, com-
plains, *For that whereas*
(to the end); then say,
Wherefore the said *John*
saith, that he is injured
and hath sustained da-
mage to the value of
500*l.* and therefore he
brings his suit, &c.

Form of a de-
claration in case.

The pledges are usually entered on the bill or 2 *Wils.* 142.
declaration (in actions by bill) at the end of the 4 & 5 *Ann. c.* 16.
conclusion, *Dyer.* 288. *a.* 4 *Inst.* 180. the want
of which is not cause of demurrer at this day. *Vide*
Fort. 330. *Barnes,* 163. *Rep. Temp. Hard.* 315.
1 *Wils.* 226.

In the *K. B.* by bill, addition of the defendant is
not necessary, for the declaration is not founded
on an original, and therefore not within the stat. 1.
H. 5. c. 5.

By the common law, no person was entitled to
bring an action until he had first found pledges to
prosecute his suit, who were real persons; but
wisdom and experience have found it necessary to

Forms of the Courts.

excuse the finding of real pledges, and therefore the fictitious names of *John Doe* and *Richard Roe* are used instead of real pledges: and in the proceeding *by bill* in the king's bench and common pleas, as also in the exchequer, these fictitious names are added to the bill. The real pledges stood securities to answer the fine to the king on the original, and also such costs as the defendant, or tenant, should be put to in all real and personal actions. Afterwards they were only found in real actions.

The plaintiff has his election to name the defendant of the place he was *lately* commorant in. *Str. 924. Cortis v. Munoz, or now is.*

In trespass, assault, battery, or imprisonment by bill, in *K. B.*

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, *For that* the said *Richard* (to the end of the declaration); then conclude thus, And other wrongs to the said, *John* then and there did, against the peace of our lord the now king, and to the said *John* his damage of 50*l.* and therefore he brings his suit, &c.; add, pledges to prosecute.

wrongs to the said *John* then and there did, against the peace of our lord the now king, &c. wherefore the said *John* saith that he is injured, and hath sustained damage to the value of 50*l.* and therefore he brings his suit, &c.

C. P. Middlesex, to wit. *Richard Fenn* late of *Westminster* in the said county, yeoman, was attached to answer *John Denn* in a plea, wherefore with force and arms, &c. (to the end of the writ part), and other wrongs to the said *John* there did, to the great damage of the said *John*, and against the peace of our lord the now king; and whereupon the said *John*, by *R. C.* his attorney, complains, *For that*, &c. (to the end of the count); then say, And other

By

By statute 4 & 5 W. and M. c. 21. s. 3. it is enacted, That in all declarations against any prisoner detained in prison, by virtue of any writ or process issued out of the court of king's bench, shall be alledged in custody of what sheriff, bailiff, or steward of any franchise, or other person having the return and execution of writs, such prisoner shall be, at the time of such declaration; by virtue of the process of the said court, at the suit of the plaintiff; which allegation shall be as good and effectual to all intents and purposes as if such prisoner or prisoners were in custody of the marshal. If it does not alledge, either expressly or by implication, at whose suit the defendant is in custody, it will be bad on a general demurrer. *Williams v. Wills*. 1 Wils. 119. K. B. *Ld. Ray*. 1362. *Merrill v. Watkins*.

The declaration by bill in the king's bench against a prisoner, to alledge in whose custody such prisoner is.

Before this statute, there could be no declaration in the court of king's bench against a defendant in the custody of a sheriff, and the practice was to bring an habeas corpus, and so turn him over to the marshal, and then to declare against him. *Lee*, C. J. 1 Wils. 120.

Before this statute, must have had an habeas corpus.

The plaintiff complained that the defendant was in debt, in the custody of the sheriff of A. in a plea that he render to him; it was held that it was as much as to say, he was in custody at the plaintiff's suit. *Ibid*.

K. B. *Oxfordshire*, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the sheriff of the county of *Oxford*, by virtue of his majesty's writ of *latitat*, (or *alias capias*, *pluries capias*, as the writ is) issuing out of the court of our lord the now king, before the king himself, against the said *Richard* at the suit

Middlesex, to wit. Against a prisoner in custody of the sheriff in *Westminster* in the said county, yeoman, was attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *Daniel Wills* his attorney, complains, For that whereas,

Against a prisoner in custody of the sheriff in C. P.

The allegation in the declaration by bill is only

Forms of the Courts.

suit of the said John, and necessary where the returnable before the plaintiff proceeds by *bill of Middlesex* or *latitat*; next after eight days of *St. Hilary*, of a plea of *trespass* on the case, *For* but if the proceeding be by *original*, the *ancient form* is adhered to in *both courts*. *that whereas*.

In Debt.

A declaration in *debt* is founded upon a *specialty*, or *judgment*, or *contract*; therefore, in all actions of debt, the declaration must shew the *certain sum demanded*: and if the contract is *contingent*, or depends upon *divers particulars*, the declaration shall demand a *sum certain*.

If the declaration be upon *several bonds* or *contracts*, what is due upon *both*, shall be demanded in *one intire sum* (d). *Yelv.* 81. *3 Leon.* 119. If it be for the arrears of an annuity, it must be for such a sum without saying *de annuali redditu*. *Yelv.* 208. In debt for 60*l.* *Flemish money*, amounting to 39*l.* *English*, the court held, that the debt ought to be demanded by a name known; for the judges are not apprised of *Flemish* money, nor could the sheriff know how to levy the money in *Flemish*. *Rastell v. Draper.* *Yelv.* 80.

If the contract be for *foreign coin*, the safest way is to declare *quod reddat* 20*l.* *certain*, or whatever other sum, and then shew the contract for so much foreign coin, which amounts to 20*l.* of lawful money of Great Britain. *2 Cro.* 88. *Mo.* 775. *1 Leon.* 41. *2 Cro.* 88.

Flemish money.

If a man binds himself in a bond to pay so much *Flemish* money, &c. the plaintiff may declare *quod reddat*, so much as it amounts to in *English* coin. *2 Cro.* 617. *Jon.* 69.

The declaration, *except it be for or against executors or administrators*, is in the *debet and detinet*.

(d) This means the penalty of both bonds.

London,

K. B. London, to wit. *Middlesex*, to wit. The form of a
John Denn complains of *Richard Fenn*, late of general declara-
Richard Fenn, being in *Westminster* in the said tion in debt, in
the custody of the marshal county, esquire, was C. P.
of the marshal's, of our summoned to answer *John*
lord the now king, be- *Denn* in a plea that he
fore the king himself, of render to the said *John*
a plea that he render to 500*l.* of lawful money The penalty.
him 500*l.* of lawful mo- of *Great Britain*, which
ney of *Great Britain*, he owes to, and unjustly
which he owes to, and detains from him, and
unjustly detains from whereupon the said *John*,
him, &c. For that where- by S. U. his attorney,
as, &c. to the said *John* complains, That where-
his damage of 10*l.* and as, &c. wherefore the
therefore he brings his said *John* saith he is in-
suit, &c. (add, pledges.) jured, and hath sustained
damage to the value of
10*l.* and therefore he brings his suit, &c.

In general, the reason why the damages are not laid higher is, that, in actions on bond, the plaintiff always recovers the penalty with 1*s.* damages for the detention of the debt, which carries the costs *de incremento*. But if you go for more damages than the penalty, then you may lay the damages as high as you please; for there are cases in which the plaintiff may recover on bond beyond the penalty.

The penalty of a bond is merely a security; and where it is not sufficient, the plaintiff may recover damages as well as the penalty. *Lord Mansfield. Trin. 6. Geo. 3.* So stated by Mr. J. Buller in 2 *Term. Rep.* 388.

Debt on a bill obligatory for 68*l.* conditioned to pay the third part of the costs when taxed. The prothonotary taxed 50*l.* for interest and damages for detaining the debt, and judgment was there given, that the plaintiff should recover his debt, and 50*l.* for his damages, by reason of the detention; and on error brought, it was held that such damages might be assessed. 2 *Saund.* 106.

Forms of the Courts.

In *Dwall v. Price*, debt was brought on a bond with a penalty of 140*l.* a bill was filed in chancery, and it was referred to a master to compute the principal interest and costs, which he computed at 154*l.* and the costs at 67*l.*; and on an appeal, this was held well in the house of lords. Cited by Mr. J. Buller in 2 *Term. Rep.* 388. Lord *Lonsdale v. Church*, in which action the court permitted defendant to pay into court the penalty, and left the plaintiff at liberty to proceed for further damages. *Vide D. ugl.* 50. *White v. Sealey*, and 2 *Blak. Rep.* 1190.

Debt on judgment.

If an action be brought on a judgment, the jury may exceed the debt recovered, by giving interest *pro detentione* of the debt; and in that case, lay the damages beyond the ordinary sum of 10*l.*

Certainty of parties' names.

If plaintiff and defendant have the same name, and it appears on the record which is which, as on oyer of a bond from *A. B. of C.* to *A. B. of D.* and the declaration begins *A. B. of C.* was summoned, &c. it is sufficient, though the addition is not repeated again. *John Connor v. John Connor.* 2 *Wils.* 386.

The two courts formerly differed in the declaration on a bond; the *king's bench* made the *profert* of the bond in the *first* part of the count, the latter adding it at the *end of the declaration*. But this is not now attended to, either way will be good.

If a person claims by deed or bond, he must make *profert*.

When a person claims by a deed in the pleadings, he ought to make a *profert of it to the court*; for by the shewing the deed in court, the court are to judge whether the deed be good. 10 *C.* 92. *or Co. Lit.* 35. *b.* So in debt upon bond, he must shew the bond.

In covenant.
K. B.

London, ff. John Denn complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord

C. P. London, ff. Richard Fenn, late of *London*, yeoman, was summoned to answer *John Denn* in a plea, that he keep

lord the now king, before the king himself, of a plea of breach of covenant, *For that whereas*, by a certain indenture, &c. to the said *John* his damage of 50*l.* and therefore he brings his suit, &c. pledges, &c. keep with him the covenant made between them, according to the force, form, and effect of a certain indenture; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas*, by a certain indenture, &c.

In actions of covenant founded on a deed, the plaintiff must make proof of the deed.

K. B. London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of breach of covenant, *For that whereas*.

of charter party, and whereupon the said *John*, by *J. S.* his attorney, complains, *That whereas*.

London, to wit. *Richard Fenn*, late of London, yeoman, was summoned to answer *John C. P.* *Denn* in a plea, that he keep with him the covenant made between them, according to the force, form, and effect of a certain indenture

K. B. London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea, *For that whereas*.

John, by *S. S.* his attorney, complains, *That whereas*.

London, to wit. *Richard Fenn*, late of London, yeoman, was summoned to answer *John Denn* of a plea, that he render to the said *John* a reasonable account by original.

Ri- For breach of covenant in an indenture of charter party in C. P.

Ri- In account by bill. C. P.

The like against defendant as surviving bailiff of the plaintiff

account of the time in which he, and one *S. S.* now deceased, and whom the said *Richard* hath survived, were the bailiffs of the said *John*, and thereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas.*

Detinue for a
bond, in *K. B.*

London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, of a plea, that he render to the said *John* a certain bond, or writing obligatory, which he unjustly detains from him, *For that whereas.*

C. P. London, to wit. *Richard Fenn*, late of *London*, yeoman, was summoned to answer *John Denn* in a plea, that he render to him a certain bond or writing obligatory, which he unjustly detains from him; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas.*

If the action be for a box containing charters and writings, then say, of a plea that he render to the said *John* a certain box, with charters, writings, and other muniments therein contained, which he unjustly detains, &c. If it be for a note, or bill of exchange, or lease, or other indenture, name them specifically.

In debt generally
on a mutatus,
&c. *K. B.*

London, ff. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, of a plea, that he render to the said *John* 100*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him, *For that whereas, &c.*

C. P. London, ff. *Richard Fenn*, late of *London*, merchant, was summoned to answer *John Denn* in a plea, that he render to him 100*l.* of lawful money of *Great Britain*, which he owes to and unjustly detains from him, &c.; and whereupon the said *John*, by *J. K.* his attorney, complains, *For that whereas, &c.*

If on a warrant
of attorney given
without a bond,
the sum men-
tioned in the
body of the war-
rant.

Of

Of Privilege.

Privilege is an exemption from some duty, burthen, or attendance, to which certain persons are entitled from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their time and care; and therefore, without this indulgence, it would be impracticable to execute such offices to that advantage which the public good requires.

All peers, without any distinction as to degree or Peers. rank, are entitled to privilege; for they are obliged to attend the service of the public, and are always supposed amenable, and to have sufficient property to answer in suits and actions brought against them; and, on these grounds, are not to be arrested or molested in their persons. A peeress by birth is entitled to privilege; so is a peeress by marriage, and that as well during the coverture as after. 4 Inst. 24. Dy. 60. 2 Inst. 50. But if she gain it by marriage, she loseth it if she marry under the degree of nobility (c). Co. Lit. 16. b. If a duchess by marriage marryeth a baron of the realm, she remaineth a duchess and loseth not her name, because her husband is noble. Ibid. This privilege formerly extended to abbots, as it now does to bishops, members of the convocation, and members of the house of commons at this day.

The sixteen elected peers of Scotland shall have all the privileges of the peers of parliament of Great Britain; also all the rest of the peers of Scotland shall have all the privileges of the peerage of England, except sitting and voting in parliament. Stat. 5. Ann. c. 8. 2 Str. 990.

In all civil causes these persons are not to be arrested, but may be proceeded against by original writ or bill, Cow. Rep. 845. in the king's bench, and by bill in the common pleas; and to compel an

(c) *Si mulier nobilis uxorem ignobili, desinit esse nobilitas.* 22 H. 6. 52. appear-

appearance, the process is by *summons* and *dis-
tringas*. Stat. 10. Geo. 3. c. 50.

Members of par-
liament,

Members of parliament shall have the like pri-
vilege of parliament, and therefore they cannot be
arrested in civil causes, but may be proceeded against
the same as peers.

Clerks of the
several courts,

The *officers, ministers, and clerks of the courts in
Westminster-Hall*, are allowed particular privileges
in respect of *their necessary attendance* on those
courts: they are regularly *to sue, and be sued in the
courts they respectively belong to*, and cannot (except
in certain cases) be impleaded elsewhere; which
privilege arises from a supposition of law, that the
business of the court, or their clients' causes,
would suffer by their being drawn into any other
than that in which their personal attendance is
required. 2 Inst. 551. 4 Inst. 71. Vaugh. 154.

Serjeants,

It is laid down that a serjeant at law must be
sued by original writ, and not by bill. Serj.
Girdler's Case. Barnes 256.

Attornies.

Attornies have privilege not to be sued in any
other courts, except those in which they are sworn
and admitted, because of the prejudice that may
accrue to the business of those courts in which
their attendance is required; neither are they to be
held to special bail, because they are obliged to
attend, and therefore are presumed to be always
amenable. 2 Leo. 256. When he joins, or is
joined in the same action *with others*, he is not
privileged. Vent. 298. Dy. 277. 2 R. II. Ab. 279.
So if he join in a bail bond, but he must be sued
jointly.

When he is
plaintiff.

When an attorney is plaintiff, he sues by at-
tachment of privilege; and is sued by bill. 4 Inst.
71. 99. 112. In the exchequer, when the plaintiff
is privileged, the suit is by *quo minus*; where the
defendant is privileged, *the suit is by bill*. 2 Salt.
546.

Judges, prothono-
taries.

The *judges, prothonotaries, &c.* of the court of
C. B. are not suable by *original*, but by *bill* only.
2 Mod. 297. 3 Lev. 398. 3 Salt. 283. pl. 8.

It

It seems a general rule, that there can be no privilege against privilege: so that if an officer of one court, sues an officer of another, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as the defendant is in his, and therefore the cause is legally attached in the court where the plaintiff is an officer. *Br. Priv. pl. 46.*

If both plaintiff and defendant be attornies of the same court, the suit must be by bill. 2 *Str.* 1099.

If an attorney of the king's bench sue an attorney of the C. B. and contrariwise, he may sue out an attachment of privilege, and hold him to bail. *Barnes 441. 1 Black. Rep. 19.*

When an action is sued by the king against a privileged person, the defendant shall not have privilege; for privilege is not good against privilege. *Ld. Raym. 27.*

Bill against peer in K.

Middlesex, to wit.
John Denn complains of *John earl of B.* of a plea of trespass on the case, *For that whereas* (add, pledges).

complains, *For that whereas, &c.*

N. B. In the common conclusion to a bill or declaration; leave out the words, "but contriving and fraudulently intending to deceive and defraud the said John," it being a contempt to charge a peer with any species of fraud; and pray process at the end of the bill, the same as against a member of parliament, (which see further on). The form of the declaration by bill in the king's bench, is an exact copy of the bill.

Middlesex, to wit.
John earl of B. was summoned to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *S. W.* his attorney,

Declaration by original in K. B.

Bill against member of parliament.

Middlesex, to wit.
John Denn complains of *Richard Penn*, esq. (having privilege of parliament)

Middlesex, to wit.
Richard Penn, late of *Westminster* in the said county, esquire, (having privi-

The like by original in K. B.

ment) of a plea of trespass on the case, *For that whereas, &c.* add, pledges.

privilege of parliament) was summoned to answer *John Denn* of a plea of trespass on the case; and whereupon the said *John*.

by *J. K.* his attorney, complains, *For that whereas.*

N. B. The like words must be left out in the conclusion of the declaration as against a peer of the realm; and at the end of the conclusion after the words *suit, &c.* add these, "*And hereupon the said John Denn prays the process of our lord the king, according to the form of the statute in such case made and provided, to be made to him thereupon, and it is granted to him, &c.*"

Prayer of process to be used against a peer or member.

The common pleas differ in the form of the bill; thus: *The term the bill is filed of,* is to be first put,

Bill against a peer in the C. P.

To the justices of our lord the king of the bench.

Middlesex, to wit. *John Denn,* by *S. M.* his attorney, complains of *C. duke of B. (f)* in a plea of trespass on the case, *For that whereas,* to suit, &c. then say, "*and hereupon the said John prays process of our lord the king, according to the form of the statute, &c. to be made to him thereupon, and it is granted to him, &c.*" add, pledges to prosecute.

Prayer of process.

Against a member in C. P.
To the justices of our lord the king of the bench.

Middlesex, to wit. *John Denn,* by *S. M.* his attorney, complains of *Richard Fenn,* esquire, (having privilege of parliament) in a plea of trespass on the case, *For that whereas,* to suit, &c. "*and hereupon the said John prays the process of our lord the king, according to the form of the statute, &c. to be made to him thereupon, and it is granted to him, &c.*" add, pledges to prosecute.

(f) In the count you need only state him to be duke; as that the duke was indebted, and that the said duke undertook and promised to pay, &c. So of a marquis, earl, or viscount.

The

The declaration in the common pleas begins with a memorandum of the plaintiff's having exhibited his bill, the same as a declaration against an attorney (which see hereafter).

Michas Term in the 34th year of the reign of king George the Third.

K. B. Middlesex, to wit. John Doe complains of *Richard Roe*, gentleman, one of the attornies of our lord the king, before the king himself, present here in court in his own proper person, of a plea of trespass on the case, *For that whereas*. At the end say, and therefore he brings his suit, &c. add, pledges to prosecute.

therefore he prays relief, &c. add, pledges.

If an attorney sues by *original writ*, he waives his privilege, and must make an attorney for him.

The declaration in the king's bench is an exact copy of the bill, but the common pleas always add a memorandum of having exhibited or filed the bill preceding; because that court requires an appearance to be entered by the defendant, and in default, a forejudger may be signed.

Michas Term, 34 Geo. 3d.

Middlesex, to wit. Be it remembered, that, on the 6th day of *November* in this same term, *John Doe*, by *S. M.* his attorney, came here into court and exhibited to the justices of our lord the king here, his certain bill against *Richard Roe*, gentleman, one of the attornies of the court of our lord the king of the bench, present here in court in his proper

C. P. To the justices of our lord the king of the bench.

Middlesex, to wit. John Doe, by *S. M.* his attorney, complains of *Richard Roe*, gentleman, one of the attornies of the court of our lord the king of the bench, present here in court in his own proper person, of a plea of trespass on the case, *For that whereas*. At the end say, and

Bill against an attorney.

Declaration.

Declaration in C. P. against an attorney.

Forms of the Courts.

proper person, the tenor of which said bill follows in these words, to wit: *To the justices of our lord the king of the bench. Middlesex*, to wit; to the end of the bill *verbatim*, adding pledges.

Form of a bill
for an attorney
in the *K. B.*
against a com-
mon person.

Middlesex, to wit.
John Denn, gentleman,
one of the attornies of
the court of our lord the
king, before the king
himself, being, accord-
ing to the liberties and
privileges of the same
court, used and approved
of in the same, from
time whereof the me-
mory of man is not to
the contrary, present
here in court, in his pro-
per person, complains of
Richard Fenn, being in
the custody of the mar-
shal, &c. of a plea, *For
that whereas*.

An attorney in the
common pleas sues al-
ways *as fact* (against
unprivileged persons), by
attachment of privilege,
and the declaration is as
follows:

Middlesex, to wit.
Richard Fenn, late of
Westminster in the said
county, yeoman, was
attached by a writ of
our lord the king of
privilege, issuing out of
the court here, to an-
swer to *John Denn*, one
of the attornies of the
court of our lord the
king of the bench here,
according to the liber-

ties and privileges of the same court, for such at-
tornies and other ministers of the same bench,
time out of mind used and approved of in the
same, of a plea of trespass on the case, &c. and
whereupon the said *John*, in his proper person,
complains, *That whereas*, add, pledges to pro-
secute.

Bill for an at-
torney against an
attorney of the
same court.

K. B. Middlesex, to
wit. *John Denn*, gentle-
man, one of the attornies
of the court of our lord
the king, before the king
himself, being, accord-
ing to the liberties and
privileges of the same
court

*C. P. To the justices of
our lord the king of the
bench.*

Middlesex, to wit.
John Denn, gentleman,
one of the attornies of
the court of our lord the
king of the bench, be-
ing

court used and approved of, from time whereof the memory of man is not to the contrary, present here in court in his own proper person, complains of *Richard Fenn*, gentleman, one of the attorneys of the said court of our said lord the king, before the king himself, present here also in court in his own proper person, of a plea of trespass on the case, *For that whereas*, add, ing, according to the liberties and privileges of the same court used and approved of, from time whereof the memory of man is not to the contrary, present here in court in his own proper person, complains of *Richard Fenn*, gentleman, one of the attorneys of the said court of the said lord the king of the bench, present also here in court in his own proper person, *For that whereas*, add, pledges.

The declaration in the *C. P.* will be the same as in the former one, with a memorandum of the bill being filed or exhibited, and stating both to be *attornits*, the same as in the bill.

If an action be commenced by an infant, he must sue by guardian, or prochein amy, as the court pleases, *Co. Lit.* 135. b. 13 *Ed.* 1. c. 15; and a general rule to prosecute and defend all suits will be sufficient. *Str.* 304.

K. B. Middlesex, to wit: *John Denn*, by *Richard Roe*, (who is admitted by the court of our lord the king, before the king himself here, to prosecute for the said *John Denn*, who is within the age of 21 years, as the next friend of the said *John Denn*) complains of *Thomas Fenn*, being in the custody of the marshal

C. P. London, *Thomas Fenn*, late of London, yeoman, was attached to answer *John Denn* in a plea of trespass on the case, and whereupon the said *John*, by *Richard Roe*, (who is admitted by the court here to prosecute for the said *John Denn*, who is within the age of 21 years as the next friend of the said

G

Forms of the Courts.

marshal of the marshal-
 sea of our lord the now
 king, before the king
 himself, of a plea, *For*
that whereas, &c. to the
 said *John Denn*, his da-
 mage of 50*l.* and there-
 fore he brings his suit,
 &c. add, pledges.

said *John Denn*.) com-
 plains, *For that whereas,*
&c. (to the end); where-
 fore the said *John Denn*
 saith, he is injured, and
 hath sustained damage to
 the value of 50*l.* and
 therefore he brings his
 suit, &c.

In an action against an infant, the plaintiff may
 declare against him as against another person; for
 if he is not chargeable in respect of infancy, he
 may plead that he is *within age by his guardian*.

Of Corporations.

Corporations.

Corporations are of several natures, all of them
 instituted for the better government of a people
 combined together, and living under a regular
 system of laws. 10 Co. 29. b.

Are aggregate or
sole.

Of corporations some are *aggregate*, and some
 are *sole*. *Corporations aggregate* consist of many
 persons united together into one society, and are
 kept by a perpetual succession of members, so as
 to continue for ever; of which kind are the
 mayor and commonalty of a city, the head and
 fellows of a college, the dean and chapter of a
 cathedral. *Corporations sole* consist of one person
 only, and his successors, in some particular station,
 who are incorporated by law, in order to give them
 some legal capacities and advantages, particularly
 that of perpetuity, which, in their natural persons,
 they could not have had. In this sense the king
 is a sole corporation; so is a bishop, so are some
 deans and prebendaries distinct from their chapters,
 and so is every parson and vicar. Co. Lit. 43.

As to name.

The names of corporations are given of necessity,
 for the name is, as it were, the very being of the
 consti-

constitution: for tho' it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is no body to plead, and be impleaded, to take and give, until it hath got a name. 10 Co. 28. 2 Inst. 666.

Corporations aggregate may sue in their own name, Corporations by an attorney appointed under their seal, and may aggregate may proceed by *latitat*, *capias*, &c. but if they be sued, sue by bill; but if sued, must it must be by original writ, and for want of appearance may be distrained. Co. Lit. 66. It is said the summons should be served on the mayor, or other head officer. Sty. Rep. 367. 1 Chan. Cas. 286. If no appearance, a *distringas* issues, whereby the sheriff may distrain the lands and goods which constitute the common stock of the corporation. 1 Vent. 51. Skin. Rep. 27. If they have neither lands nor goods, it is said, there is no way to compel them to appear, 1 Vern. 122. but only in parliament, 1 Chan. Cas. 204. for it is a rule, that, for a public concern, the sheriff cannot distrain any private person who is a member of the corporation. 1 Vent. 351. Cowp. 85. Bro. Ab. 135.

A corporation aggregate cannot be outlawed. Cannot be outlawed. 10 Co. 12. b. 45 Ed. 3. 2, 3. No attachment lies against a corporation, Raym. 152. nor can be declared against as in custody of the marshal. 6 Mod. 183. Ld. Ray. 79.

They must sue by their name of incorporation, Must sue by 2 Inst. 666. and must also be sued by the name of their name. incorporation. Ibid.

A sole corporation shall be tried by his name of Sole corporation. baptism, and must always shew *quo jure* he is seized. 2 Lev. 68. Dy. 85. b.

If a corporation be mis-named it may be pleaded, Misnomer. but only in abatement. 26 H. 8. 1 b. Bend. pl. 89.

London, to wit. The C. P. London, to wit. For the corporation of London
mayor and commonalty, John Roe, late of, &c. in case.
and G 2 was

tenant to the action. 2 *Vent.* 215. The copy of original to be served upon the high constable of the hundred wherein the robbery shall happen, who is to cause appearance to be entered. *Vide the stat.* 8 *Geo.* 2. c. 16. 22 *Geo.* 2. c. 24 and 26. The venire shall be awarded *de corpore comitatus*, except the hundred against which the action is brought, 29 *Geo.* 2. c. 18.

ACTIONS *qui tam*, &c.

ACTIONS upon statute are at the suit of the king only, viz. by indictment or information; or at the suit of the party, *qui tam pro domino rege quam seipso sequitur*; or at the suit of the party alone.

An action *qui tam* must be to answer the party who sues as well for the king as for himself, *Cro. Car.* 256. or *ad respondendum domino regi et parti qui tam*, &c. *Cro. Car.* 256. *Jon.* 261.

If by a statute a penalty be expressly allotted to the party grieved, he alone may sue for it, without saying, *qui tam*, &c. So upon every statute which gives the penalty, to the party grieved.

If penalty be given to the informer, and poor.

If the act of parliament gives a penalty to the informer and the poor of the parish, the declaration may be either "to render to the informer," or, "to the informer and the poor," and so may the judgment. 4 *Burr.* 2018. *Frederick v. Lookup.*

Declaration by original ass of informer where the poor is entitled to a part.

Middlesex, to wit. Sir Thomas Frederick, late of *Westminster* in the said county, baronet, was summoned to answer to Andrew Lookup, who sueth as well for himself as for the poor of the parish of *St. Paul Covent-garden* in the county of *Middlesex* aforesaid, in a plea that he render to the poor of the parish aforesaid, and to the said Andrew who sueth as aforesaid, the sum of 3150*l.* which he owes to them, and unjustly detains, &c.; and whereupon the said Andrew, who sueth as aforesaid by S. B. his attorney, saith, That, &c. to the said Andrew, who sues as aforesaid, his damage of 10*l.* and therefore he brings suit, &c.

Declaration on a *qui tam* action by bill.

London, ff. John Denn, C. P. *London*, ff. Richard Fenn, late of *London*, who sues in this behalf, as yeoman,

as well for our sovereign lord the king as for himself, complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea that he render to our said lord the king, and to the said *John*, who sues as aforesaid, 500*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from them, *For that whereas, &c.*; whereupon the said *John*, who sues as aforesaid, saith, that he is injured and hath sustained damage to the value of 10*l.* and thereupon he brings his suit, &c.

In actions upon any general statute, it is ordered, that the declaration repeat not the original writ, but only the nature of the action, as in a plea of trespass and contempt against the form of the statute. *R. M. 1654. sect. 16.*

Oxfordshire, to wit. *Richard Fenn*, late of *Declaration in replevin.*
Witney in the said county, was summoned to answer *John Denn* of a plea wherefore he took the cattle of the said *John*, and unjustly detained them against sureties and pledges; and whereupon the said *John*, by *S. U.* his attorney, complains, *That* the said *Richard*, on, &c. to the end of the count; then say, *Whereupon* the said *John* saith, that he is *Conclusion*
 injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

If cattle and household goods, &c. are taken, say, of a plea wherefore he took the cattle, goods, and chattels of the said *John*, and unjustly detained, &c.

Forms of the Courts.

As this proceeding is by original in *both courts*, the above form will do in either.

Venue where cattle taken, or drove after taking.

The declaration may be laid in *the county where the cattle or goods were taken, or in the county into which they are drove after the taking.* *F. N. B. 69. 2 Wils. 355.*

Declaration must be several, two persons who have joint interest cannot join.

The declaration must be several by every one who has several property, for two persons who have not a joint interest, cannot join in replevin. *Coke Lit. 145. b.*

The taking need not be laid in place where it originally was.

The taking *need not be laid in the place where the taking originally was, any other place, where the cattle when in defendant's custody, is good.* *2 Wils. 354. Walton v. Kerslop. Vide 1 Sid. 9. Barn. 353.* If there is a wrongful taking at first, the wrong is continued to any place where the defendant has them. *2 Wils. 355. Wilmet, C. J.*

Of Executors.

Executors, &c.

If there be *several executors, all must join in the action, altho' some do not prove the will, 9 Co. 37. 1 Sid. 449.* but when actions are brought against them, *it must be only against such as administer.* *1 Roll. Ab. 924.*

Auto form of the declaration.

With respect to the forms of declarations by and against *executors and administrators*, where the action is *upon promises* made to, or by the testator or intestate, it is to be observed, that where they sue for a thing that is demanded in right of their testator, they are to name themselves *executors or administrators*, which shews a title in them to recover the demand; and at the foot of the declaration, they are to make a *profert of the letters testamentary, or letters of administration* granted, or the declaration will be bad on a special demurrer: and if they be sued for the debt of the testator or intestate, the plaintiff must name them *executors or administrators.*

By executor of an executor.

In a declaration by an executor of an executor, he

he should set forth, that the first executor proved the will; for otherwise he has no title, 2 Str. 716. but it is aided after verdict.

An executor cannot join in the same declaration a demand by his testator, and in his own right. Cannot join a demand of his own with that of testator.
1 Wilf. 171. Hooker, Ex. v. Quilter.

An executor may bring an action before probate, but cannot declare till probate granted; for when he comes to declare, he must produce his letters testamentary. Salk. 302. Went. 34. May bring action before probate, but not declare.

K. B. London, ff. John Dann, executor of the last will, and testament of Richard Roe deceased, complains of Richard Fenn, being in the custody of the marshal of the marshal-see of our lord the now king, before the king himself, For that whereas (to the end of the declaration), to the said John, executor as aforesaid, his damage of 100*l*. and therefore he brings his suit, &c. And the said John Dann brings here into court the letters testamentary of the said Richard Roe, whereby it fully appears to the court here, that the said John is the executor of the last will and testament of the said Richard Roe, and hath the administration thereof, &c. add, pledges.

where of
a letters
testamen-
tary.

C. P. London, to wit. For an executor Richard Fenn, late of in case. London, yeoman, was attached to answer John Dann, executor of the last will and testament of Richard Roe deceased, in a plea of trespass on the case; and whereupon the said John, by J. S. his attorney, complains, For that whereas (to the end of the declaration, suit, &c.) then say, And the said John brings here into court the letters testamentary of the said Richard Roe, whereby it fully appears to the court here, that the said John is the executor of the last will and testament of the said Richard Roe, and hath the administration thereof, &c.

An executor must show the letters testamentary of the testator, and the want of it: was formerly held to be not aided on a general demurrer, Gro. good cause of Eliz. special demurrer.

Forms of the Courts.

Eliz. 551.; now it is aided by stat. 4 & 5 *Ann.* c. 16. and must be shewn *specially for cause of demurrer.*

Against an executor by bill.

London, to wit. John Denn complains of *Richard Fenn*, executor of the last will and testament of *Richard Roe* deceased, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas.*

N. B. In this case, the plaintiff cannot make a *profert of the letters testamentary* of the defendant's testator, because he has no power to produce them.

By a surviving executor.

London, to wit. John Denn, surviving executor of the last will and testament of *Richard Roe* deceased, complains of *Richard Fenn*, being in the custody of the marshal, &c. of a plea of trespass on the case, *For that whereas, &c.*

Profert.

that whereas. And he brings into court here the letters testamentary of the said *Richard*, whereby it fully appears to the court here, that the said *John*, and one *James Roe*, in the life-time of the said *James*, were the executors of the last will and testament of the said *Richard*; and the said *James* being now dead, the said *John* is the surviving executor as aforesaid, and hath the administration thereof, &c.

C. P. London, to wit. Richard Fenn, executor of the last will and testament of *Richard Roe* deceased, was attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas.*

C. P. London, to wit. Richard Fenn, late of, &c. was attached to answer *John Denn*, surviving executor of the last will and testament of *Richard Roe* deceased, in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *For*

K. B.

K. B. London, to wit. *John Denn* complains of *Richard Fenn*, surviving executor of the last will and testament of *Richard Roe* deceased, being in the custody of the marshal of the marshalsea, &c.

London, to wit. *Richard Fenn*, surviving executor of the last will and testament of *Richard Roe* deceased, was attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney,

Against a surviving executor.

complains, *That whereas,*

If the executor of the executor have any goods or chattels in his hands, which did not belong to the first testator, the executor of the same testator surviving, may have action against the executor of the executor for the same; for the power of the executor who died first, was determined by his death, the other then surviving. *Swin. 324.*

Executor of executor.

If two be appointed executors, and the one maketh his testament, wherein he nameth an executor, and dieth, his co-executor surviving; in this case, the executor of the executor is not to be joined with the executor surviving, neither in the will, nor in suits or actions. *Ibid.*

If two appointed executors, and one dies, leaving an executor, his co-executor living.

London, to wit. *John Denn*, executor of the last will and testament of *Richard Roe* deceased, complains of *Richard Fenn*, executor of the last will and testament of *Robert Wills* deceased, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case. *For that whereas.* Add, pledges; and also the profert

C. P. London, to wit. *Richard Fenn*, late of London, yeoman, executor of the last will and testament of *Robert Wills* deceased, was attached to answer *John Denn*, executor of the last will and testament of *Richard Roe* deceased, in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *That whereas, &c.* to the said *John*, executor as aforesaid,

For an executor against an executor in case.

Forms of the Courts.

profert in curia of the letters testamentary of *Richard Roe* only.

said, his damage of 50*l.* and therefore he brings his suit, &c. add, the *profert in curia* of the

letters testamentary of *Richard Roe* only.

Against the executors of an executrix in case.

London, to wit. *John Denn* complains of *Richard Fenn* and *Thomas Doe*, executors of the last will and testament of *H. F.* widow deceased, who was, in her life time, executrix of the last will and testament of *R. F.* her late husband deceased, being in the custody of the marshal of the marshal-*sea* of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas,*

C. P. London, to wit, *Richard Fenn*, late of *London*, yeoman, and *Thomas Doe*, late of the same place, yeoman, executors of the last will and testament of *H. F.* widow deceased, who was, in her life time, executrix of the last will and testament of *R. F.* her late husband deceased, were attached to answer *John Denn* in a plea of trespass on the case, &c.; and whereupon the said *John*, by *J. K.* his attorney, complains, *For that whereas,*

For a husband and wife, where the wife was executrix in case.

London, to wit. *John Denn*, and *Ann* his wife, (which said *Ann* is the executrix of the last will and testament of *Richard Doe* deceased) complain of *Richard Fenn*, being in the custody of the marshal of the marshal-*sea* of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas.* Add, pledges; and, *profert in curia* of

C. P. London, to wit, *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, and *Ann* his wife, (which said *Ann* is the executrix of the last will and testament of *Richard Doe* deceased) in a plea of trespass on the case; and whereupon the said *John*, and *Ann* his wife, executrix as aforesaid, by *J. S.* their attorney, complain, *For that whereas,*

of the letters testamentary, *whereas, &c. add; present in curia of the letters testamentary.*

K. B. London, to wit. *John Denn* complains of *Richard Fenn*, and *Ann* his wife, (which said *Ann* is the executrix of the last will and testament of *Richard Dee* deceased) being in custody of the marshal of the marshal-
sea of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas.* Add, pledges,

C. P. London, to wit. *Against a husband and wife executrix in case.* *Richard Fenn*, late of London, yeoman, and *Ann* his wife, (which said *Ann* is the executrix of the last will and testament of *Richard Dee* deceased) were attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *Richard Fenn*, by *J. K.* his attorney, complains, *For that whereas.*

Executors of executors shall have actions of debt, account, and of goods carried away of their first testator, in the same manner as the first testator. 25 Ed. 3. ft. 5. c. 5. Executors of executors.

Middlesex, to wit. *John Denn*, executor of the last will and testament of *Richard Gee* deceased, who was executor of the last will and testament of *John Doe* deceased, complains of *Richard Fenn*, being in the custody of the marshal of the marshal-
sea of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas.*

Middlesex, to wit. *Richard Fenn*, late of Westminster in the said county, yeoman, was attached to answer *John Denn*, executor of the last will and testament of *Richard Gee* deceased, who was executor of the last will and testament of *John Doe* deceased, in a plea of trespass on the case; and whereupon the said *John*, executor as aforesaid, by *J. K.* his attorney, complains, *For that whereas.* And *For an executor of an executor in case.*

Proferat hic in curia.

And the said *John Denn* brings into court here, as well the letters testamentary of the said *John Doe*, by which it appears to the court here that the said *Richard Gee* was the executor of the said last will and testament of the said *John Doe* deceased, as also the letters testamentary of the said *Richard Gee*, by which it appears to the court here, that the said *John* is the executor of the last will and testament of the said *Richard Gee*, and hath the administration thereof, &c.

Executors de son tort.

Executor de son tort, who.

If a man dies intestate, and a stranger takes his goods and uses them, or sells them, this shall make him executor *de son tort*, 5 Co. 33. b. and he remains chargeable as a wrongful executor, *unless he deliver the goods over to the administrator before action brought*; and then he may plead, *plene administravit*. 1 Salk. 313. Such an executor cannot bring an action, for he cannot shew the letters granted. But he renders himself liable not only to the action of the rightful executor, but also to the suits of the testator's creditors; yet only so far as the goods he so wrongfully administered amount to. Swin. 339. 12 Mod. 441. As he himself is liable to the suit of the lawful executor, creditor, or legatees; so also, in case of his death, are his executors or administrators liable. Stat. 30. Car. 2. c. 7. And if an executor *de son tort* be sued in the declaration, *he shall be named executor generally (as executor of the last will and testament)*, for there is no other form of the writ or count. 5 Co. 31. a. The most obvious conclusion, which a stranger can form from his conduct, is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof, 12 Mod. 471.; and the same conclusion to a declaration against an executor will serve against an executor *de son tort*.

Declaration, the form of.

Of

Of Administrators.

Altho' an executor may bring an action before probate, yet it is laid down, that an administrator cannot, till administration granted for the power of the first is derived from the will, that of the latter from the ordinary. 1 Roll. Ab. 917. A. 2.

Administrators cannot bring actions before administration granted.

If there be several administrators all must be joined. Reg. 140. a.

Care should be taken where the administration is taken out, or will proved, before action brought.

The spiritual court is the only court that hath jurisdiction of the probate of wills; and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating thereof. And, generally, the person before whom the testament is to be proved, is the bishop of the diocese where the testator dwelled, or his officer, Swinb. 427.

Spiritual courts grant probates, &c.

Archdeacons, as such, have no power to grant probate or commit administration, altho' most archdeacons in England do it; but they do it not as archdeacons, but by a prescriptive right. Gibs. 478.

Archdeacon.

There are also certain peculiar ecclesiastical jurisdictions, where by prescription or composition, or other special title, the probation and approbation of the testaments of such as dwell and die within those places, doth appertain to the judge of that peculiar. Swin. 427.

Peculiary.

Within the province of Canterbury there are fifty-seven peculiars, all of which belong to the archbishop. Goldsb. Rep. 119.

57 peculiars in prov. of Cantab.

The court of the archbishop of Canterbury is the court wherein all testaments be proved, and administrations granted, where the party, dying in his province, hath bona notabilia, in some other diocese, than where he dieth, 4 Inst. 335. which regularly

In case there be bona notabilia, archb. prerogative.

gularly is to be of the value of five pounds, but in the diocese of *London* it is 10*l.* by composition. *Ibid.*

The like court the archbishop of *York* hath. 4 *Inst.* 335.

If a man hath
bona notabilia in
several dioceses:

If a man have *bona notabilia* in several dioceses of the same province, there must be a prerogative administration; if one leaves *bona notabilia* in two dioceses of *Canterbury*, and two dioceses in the province of *York*, there must be two prerogative administrations; but where in one diocese of one province, and in another diocese of another province, each bishop must grant one. *Salk.* 39. *Burston v. Ridley.*

Bishop's testament.

The probate of every bishop's testament, of granting of administration of his goods, although he hath no goods, but within his own jurisdiction, doth belong to the archbishop. 4 *Inst.* 335.

When the arch-
bishop to grant.

If a man dieth in one diocese, not having goods there, but had *bona notabilia* in another diocese, this shall be sufficient *bona notabilia* for the archbishop to grant administration; because the ordinary where he dieth, by the law, is to take as great care of the testator and his goods, as the other ordinary where the goods are. 1 *Roll. Abr.* 909.

When not *bona
notabilia.*

If a man die on a journey, the goods about him are not *bona notabilia.* *Swin.* 438.

Persons dying
intestate, where
money is due
from the king
for work in dock
yards.

With respect to persons dying intestate, who have monies due for work done in the dock-yards of the king, power is given to the ordinary of the diocese to grant same where they shall die, and such wages not to be considered as *bona notabilia.* 4 *Ann.* c. 16. s. 26.

What debts are
bona notabilia.

Debts owing to the testator are *bona notabilia*, as well as goods in possession, 1 *Roll. Abr.* 909.; and they shall be *bona notabilia* in that diocese where the bonds or other specialties be, and not where the debtor inhabits. *Ibid.* But if the debts be only by compact, without specialty, then they are to be esteemed *bona notabilia* in that place where the debtor is. *Went.* 46.

Judgments obtained in the courts of *Westminster*, Judgments at upon actions laid in the country, are *bona notabilia*, *Westminster*. not where the action was laid, but where the judgment was obtained; because the record is there. 3 *Mod.* 324. *Vide Carthew* 148. Therefore an administration, by the archdeacon of *Dorset*, is no title to sue on a judgment in any of the courts of *Westminster*, 1 *Salk.* 40. there must be a prerogative administration for this purpose.

Simple contract debts are personal, and administration must be committed of them where the party dies. And if a man have two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two dies, administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller. 1 *Salk.* 37.

A bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is; for it is no specialty in law. 3 *Salk.* 164. Bill of exchange.

Where one dies possessed of goods in several peculiars within the same diocese, administration shall not be granted by the bishop of the diocese, but by the metropolitan, inasmuch as they are exempt from ordinary jurisdiction. *Gibb.* 472. *Swin.* 440. If one dies possessed of goods in several peculiars.

The order of granting letters of administration, is, 1. To the husband of the wife's goods and chattels. 2. To the wife of the husband's goods and chattels. 3. If there is no husband or wife, to the children, sons or daughters. 4. If there be no children alive, to the father or mother. 5. Then to a brother or sister of the whole blood, or of the half blood (who, for this purpose, are of equal degree of the whole blood); 6. and if there are none such, to the next of kin, as uncle, aunt, or cousin. 7. Then to a creditor of the deceased; 8. and, for want of all these, to any other person, at the discretion of the ordinary. *Wood's Inst.* 333. When to the residuary legatee. 1 *Vent.* 219. The order of granting letters of administration.

Mother.

A mother is to have administration before a brother or sister. *Stat. 21 H. 8.*

The origin of administration.

The origin of administrators is derived from the civil law. Their establishment is owing to a statute made in the 31 *Ed. 3.* till then, no such office was known beside that of executor.

Several sorts of administrators.

There are divers sorts of *administrators*, 1. He to whom the ordinary commits administration of the goods, in default of an executor. 2. Administrator *cum testamento annexo*, upon an executor's refusal to prove the testament, or upon his dying before probate. 3. Administrator *de bonis non*, being of the goods of the testator remaining unadministered, by reason of his executor's dying intestate. 2 *Roll. Abr.* 907. 4. Administrator *durante minore etate*, where an infant is entitled to administration of the goods of an intestate; in which case, the administration is granted to another, until he is of the age of twenty-one years. Tho' where the infant is made executor, such administration, during his minority, ceases on his coming to the age of *seventeen*. 5 *Rep.* 29. 6 *Rep.* 27. 5. Administrator *pendente lite*, where a suit is depending in the ecclesiastical court, touching the validity of the will, 2 *P. Wms.* 589.; and *durante absentia extra regnum*, as when the executor is out of the realm, such administration is granted by law; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. 1 *Lut.* 342. 2 *Ld. Ray.* 1071.

Of bastards.

If a bastard who has no kindred, being *nullius filius*, or any one else that has no kindred, dies intestate and without wife or child, it hath been formerly held, that the ordinary might seize his goods, and dispose of them in *pious usus*. But the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown. 3 *P. W.* 33.

K. B. Lon-

K. B. *London*, to wit. *John Denn*, administrator of all and singular the goods, chattels, and credits which were of *Richard Roe* deceased; who died intestate, complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas* (to the end of the declaration), suit, &c.; then say, And he brings into court here the letters of administration of the said *Richard Roe*, which sufficiently proves to the court here, the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf above-mentioned. Add, pledges.

ent b'c
of
letters
admini-
stratio-
no.

C. P. *London*, to wit. *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, administrator of all and singular the goods, chattels, and credits which were of *Richard Roe* deceased, who died intestate, in a plea of trespass on the case; and whereupon the said *John*, administrator as aforesaid, by *J. S.* his attorney, complains, *For that whereas*, &c. suit, &c.; and he brings into court here the letters of administration of the said *Richard Roe*, which sufficiently proves to the court here, the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf above-mentioned.

Form of a de-
claration for an
administrator in
case.

In an action brought by an administrator himself, whose power to sue is founded upon the letters of administration, it must be *alleged* in the declaration, that administration was committed to him, and that those that granted it, *had a right to grant it*. *Rawinson v. Stone*, 3 *Will.* 4. *Lee, C. J.* The omission of letters of administration was held to be substance, *Hob.* 233.; but now the omission must be shewn on a *special demurrer*. *Stat.* 4 & 5 *Ann.* c. 16.

Letters of admini-
stration must
be alleged.

London, to wit. *John Denn*, surviving administrator

London, to wit. *Richard Fenn*, late of *London*, was

For a surviving
administrator.

Forms of the Courts.

nistrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, complains of *Richard Fenn*, being, &c.

Profut.

And he brings into court here the letters of administration of the said *Richard*, which sufficiently proves to the court here, that the said *John* and *Robert*, in the life-time of the said *Robert*, were administrators in form aforesaid, and that administration was granted to them in form aforesaid, the date whereof is on the day and year aforesaid; and that the said *Robert* being now dead, the said *John* is the surviving administrator as aforesaid.

If administration be granted to two, and one dies, the office survives, 2 *Fern.* 514. and actions may be brought by the survivor.

Against a surviving administrator.

London, to wit. *John Denn* complains of *Richard Fenn*, surviving administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, being, &c. For that whereas.

London, to wit. *Richard Fenn*, surviving administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, was attached to answer *John Denn* in a plea, &c.

The persons deputed administrators shall answer in the king's court, to other to whom the dead persons was holden and bound, in the same manner as executors shall answer. 31 *Ed.* 3. ft. 1. c. 11.

By an administrator against an administrator, in case.

London, to wit. *John Denn*, administrator of all and singular the goods,

London, to wit. *Richard Fenn*, late of *London*, yeoman, administrator

goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, complains of *Richard Fenn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Robert Wells* deceased, who died intestate, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas*. Add, proferet of the letters of administration, granted to the plaintiff only, as in p. 99.

strator of all and singular the goods, chattels, rights, and credits which were of *Robert Wells* deceased, who died intestate, was attached to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who also died intestate, in a plea of trespass on the case; and whereupon the said *John*, administrator as aforesaid, by *John Waller* his attorney, complains, *For that whereas*, &c. Add, the proferet of the letters of administration, granted to the plaintiff only.

The plaintiff need not make an averment that administration was granted to the defendant, *Comb.* 465. the naming him administrator in the declaration is sufficient. *Barn.* 159.

K. B. *London*, to wit. *John Denn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods, chattels, rights, and credits which were of *Richard Doe*, her late husband deceased, who died intestate,) complain of *Richard Fenn*, being in custody of the marshal of the marshalsea of our lord

C. P. *London*, to wit. For a husband and wife, where *Richard Fenn*, late of the wife was administratrix in *London*, yeoman, was attached to answer *John Denn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods, chattels, rights, and credits which were of *Richard Doe*, her late husband deceased,) of a plea of trespass on the case; H 3 and

Forms of the Courts.

lord the now king, before the king himself, *For that whereas.* and whereupon the said *John* and *Ann* (administratrix as aforesaid), by *J. K.* their attorney, complain, *For that whereas.*

Profect.

And the said *John*, and *Ann* his wife, bring into the court here, the letters of administration of the said *Richard Doe* deceased, by which it appears to the court here, that the said *Ann* is the administratrix of the goods, chattels, and credits of the said *Richard*, and have the administration thereof, &c.

Against a husband and wife, where she was administratrix in case.

Middlesex, to wit. *C. P. Middlesex*, to wit. *John Denn* complains of *Richard Fenn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods and chattels, rights and credits, which were of *John Roe*, her late husband deceased, who died intestate,) being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, *For that whereas.* Add, pledges. *Richard Fenn*, late of, &c. and *Ann* his wife, (which said *Ann* is, administratrix of all and singular the goods, chattels, rights, and credits which were of *John Roe*, her late husband deceased, who died intestate,) were attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas, &c.*

For an administrator during the minority of the executor in case.

Middlesex, to wit. *C. P. Middlesex*, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *J. K.* deceased, with the will of the said *J. K.* annexed, during the minority of *J. G.* executor, named in the last *Richard Fenn*, late of *Westminster* in the said county, yeoman, was attached to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *J. K.* deceased, with the

last will and testament of the said *J. K.*, complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, *For that whereas.*

the will of the said *J. K.* annexed, during the minority of *J. G.* executor, named in the last will and testament of the said *J. K.*; in a plea of trespass on the case; and whereupon the said *John*, administrator as aforesaid, complains, *For that whereas.*

And he brings into court here the letters of administration of the said *J. K.* with the will annexed, which sufficiently proves to the court here, the granting thereof to the said *John Denn*, during the minority of the said *J. G.* executor as aforesaid, and hath the administration thereof, &c.

An infant, how young soever he be, may be named executor, yet the execution of the will shall not be committed unto him until 17; for administration, granted *durante minore etate*, ceaseth when the infant executor attains to that age, *Swin.* 331. but an administration during the minority of an infant administrator, ceaseth not until 21. *Ld. Raym.* 667. *Freke v. Thomas.*

Infant executor, when may take probate, and when infant administrator.

London, to wit. *John Denn* complains of *Richard Fenn*, administrator of all and singular the goods, chattels, rights, and credits which were of *J. K.* deceased, with the will annexed of the said *J. K.* during the minority of *J. G.* executor of the last will and testament of the said *J. K.* being in the custody of the marshal, &c.

London, to wit. *Richard Fenn*, late of *London*, yeoman, administrator of all and singular the goods, chattels, rights, and credits which were of *J. K.* deceased, with the will annexed of the said *J. K.* during the minority of *J. G.* executor of the last will and testament of the said *J. K.* was attached to answer *John Denn* in a plea of

Against an administrator during the minority of the executor in case.

trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas:*

What averment
necessary.

If an action be *against an administrator*, during the minority of an executor, he need not alledge that the other is within 17 years; for a stranger cannot know when his authority determines, and if it be determined, the defendant ought to shew it. 1 *Sid.* 57. *Vaugh.* 93. *after verdict* 2 *Cro.* 590. *Yelv.* 128.

For an admini-
strator *de bonis*
non.

London, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, who was administrator of the goods and chattels, rights and credits, which were of the said *Richard Roe*, complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, &c.

C. P. London, to wit. *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, who was administrator of the goods, chattels, rights, and credits, which were of the said *Richard Roe*, in a plea of trespass on the case; and whereupon the said *John*, &c.

Profert.

And he brings into court here, the said letters of administration of the unadministered goods of the said *Richard Roe* deceased, whereby it fully appears to the court here, the granting thereof in form aforesaid, the date whereof is the day and year in that behalf above-mentioned.

Against an ad-
ministrator *de*
bonis non.

London, to wit. *John Denn* complains of *Richard Fenn*, administrator of the goods, chattels, rights, and credits which were

London, to wit. *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, administrator of the

were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, who was administrator of all and singular the goods, chattels, rights, and credits which were of the said *Richard Roe*, being in custody of the marshal, &c, the goods, chattels, rights, and credits which were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, who was administrator of all and singular the goods, chattels, rights, and credits which were of the said *Richard Roe*, in a plea of trespass on the case; and whereupon the said

John, administrator as aforesaid, by *J. S.* his attorney, complains, *For that whereas.*

London, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Joseph Dix* deceased, with the will of the said *Joseph Dix* annexed, complains of *Richard Fenn*, being in the custody of the marshal, &c.

London, to wit. *Richard Fenn*, late of, &c. yeoman, was attached to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Joseph Dix* deceased, with the will of the said *Joseph Dix* annexed, in a plea of trespass on the case; and whereupon the said

For an administrator with the will annexed.

John, by *J. S.* his attorney, complains, *For that whereas.*

And he brings into court here the letters of administration, with the will annexed of the said *Joseph Dix* deceased, which sufficiently appears to the court here, the granting thereof in form aforesaid, the date whereof is the day and year in that behalf above-mentioned. *Profer.*

When all the executors refuse to prove, administration will be granted with the will annexed; and such an administrator shall have actions, and administer the goods, as if the deceased had died intestate. *When all the executors refuse.* *1 Roll. 907.*

In

In Debt by and against Executors and Administrators.

I shall now proceed to shew forms of declaration *in debt*, by and against executors, where the demand is due *to the estate* of the testator, or *from him*. And herein it will be necessary to observe, that, in all actions of debt brought by an executor or administrator, the declaration must be in the *detinet* only, altho' the debt accrued in his own time, 5 Co. 31. b.; for a person can only be said to owe to the person to whom the money when received would belong, that is, to the testator or intestate's estates, not to his executor or administrator. 1 Lev. 250.

And such executor or administrator being charged in the *detinet* only, there he shall answer only out of the testator's estate. Allen. 40. Sty. 79.

If executor recovers in debt,

If an executor recovers in an action of debt due upon the contract of the testator, the writ shall be in the *detinet* only, 1 Roll. 602. pl. 3.; and the reason is, because it is founded upon the testator's contract. But if an executor takes a bond for a debt due to the testator by contract, in an action of debt upon this bond, the declaration shall be in the *debt* and *detinet*. Ibid. pl. 5.

or if he takes bond.

Where part in time of testator.

If debt be brought for rent, where part incurred in the time of the testator, and part after his death, the executor may be charged in the *detinet* for the whole. Allen. 76. Sty. 118.

Escape.

If an executor recover a judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape; here, as the first action was in the *detinet*, this action being founded upon the same record, it ought to pursue it. Cro. Eliz. 326. Hitchcock v. Skinner and Lacey. 1 Roll. Abr. 602.

But

But if an executor recover a judgment for goods *taken upon his own possession*, there, upon an action founded upon *that judgment*, the declaration ought to be in the *debet and detinet*, for he need not name himself executor. 1 Roll. 602. Letter Q. pl. 2.

If he recover for goods in his own possession.

If an executor obliges *himself* to pay a debt due by contract by the testator, in an action of debt upon this bond, the declaration must be in the *debet and detinet*; because the bond made it his own debt. Ibid. 663. Letter S. pl. 8.

If executor obliges himself to pay.

After judgment *against an executor* one may have debt in the *debet and detinet*, suggesting a *devastavit*, and charge him *de bonis propriis*. 5 Co. 31. Ibid. 36. So in debt for rent incurred in *his own time*. Ibid.

After judgment against an executor.

It is said, that debt on simple contract will not lie against an executor or administrator, the proper remedy is an action on the case; for the testator might have waged his law, which the executor or administrator cannot do. *Pinchon's Case*. 9 Co. 87. Cro. Car. 135. *Morgan v. Green*.

Debt on simple contract, will not lie against an executor.

If the action be debt *for rent*, the declaration must be in the *detinet*, tho' the rent in this case was on a demise, which commenced on the death of the testator, so that he never received any rent. Cro. Eliz. 940. *Spark v. Spark*.

Debt for rent.

When executors sue upon any *contract of their testator*, or for any wrong done to him, they shall pay no costs either upon a nonsuit, or verdict against them. 3 Salk. 105. 1 Salk. 107. 3 Burr. 1856. But they pay costs upon a *nonpross*, 3 Burr. 1584.; and sometimes upon discontinuance, if it be their *own fault*, or for not going to trial. 1 Salk. 314. Barn. 107. 4 Burr. 1929.

When executors pay costs, and when not.

But if the cause of action arises *in the time of the executor*, and is therefore a matter *within his own knowledge*, and for which he may declare in his own right, and need not declare as executor, he shall be liable to pay costs. Str. 682. 1106.

As to his own time.

If an executor brings error on a judgment *after a devastavit*, he is to pay costs on affirmance. Str. 977.

Error.

London,

Form of a declaration for an executor in debt, for a debt due to the testator.

London, to wit. John Denn, executor of the last will and testament of Richard Roe deceased, complains of Richard Fenn, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said John, executor as aforesaid, 100l. (h) of lawful money of Great Britain, which he unjustly detains from him, For that whereas.

Proferat hic in curia.

And he brings into court here, the letters testamentary of the said *Richard Roe* deceased, whereby it fully appears to the court here, that the said *John* is the executor of the last will and testament of the said *Richard Roe*, and hath the administration thereof, &c. In the *K. B.* add pledges, but not in the *C. P.*

Against an executor.

London, to wit. John Denn complains of Richard Fenn, executor of the last will and testament of Richard Roe deceased, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea that he render to him 100l. of lawful money of Great Britain, which

The plaintiff in this case cannot make proferat of the letters testamentary of the defendant's testator, because he has them not to produce.
Penalty.

C. P. London, to wit. Richard Fenn, late of, &c. was summoned to answer John Denn, executor of the last will and testament of Richard Roe deceased, in a plea, that he render to the said John, executor as aforesaid, 100l. of lawful money of Great Britain, which he unjustly detains from him; and whereupon the said John, by J. S. his attorney, complains, That whereas, &c.

London to wit. Richard Fenn, late of, &c. yeoman, executor of the last will and testament of Richard Roe deceased, was attached to answer John Denn in a plea that he render to the said John 100l. of lawful money of Great Britain, which he unjustly detains from him; and whereupon the said John, by J. S. his

(h) The penalty of the bond.

which he *unjustly detains* from him, *For that* ~~*whereas*~~. To the said *John* his damage of 10*l.* and therefore he brings his suit, &c. Add pledges.

his attorney, complains, *That whereas, &c.* wherefore the said *John* saith that he is injured, and hath sustained damage to the value of 10*l.* and therefore he brings his suit, &c.

London, to wit. *John Denn*, surviving executor of the last will and testament of *Richard Roe* deceased, complains of *Richard Fenn*, being, &c. of a plea, that he render to the said *John*, surviving executor as aforesaid, 100*l.* of lawful money of Great Britain, which he *unjustly detains* from him, *For that whereas*.

London, to wit. *Richard Fenn*, late of, &c. was summoned to answer *John Denn*, surviving executor of the last will and testament of *Richard Roe* deceased, in a plea, that he render to the said *John* 100*l.* of lawful money of Great Britain, which he *unjustly detains* from him; and whereupon the said *John*, surviving executor as aforesaid, by *J. S.* his attorney, complains, *For that whereas*.

For a surviving executor in debt.

The penalty.

And he brings into court here the letters testamentary of the said *Richard Roe* deceased, by which it appears to the court here, that the said *John Denn*, and *Robert Nix*, in the lifetime of the said *Robert*, were executors of the last will and testament of the said *Richard*; and the said *Robert* being now dead, the said *John* is the surviving executor as aforesaid, and hath the administration thereof, &c. In *K. B.* by bill, add pledges.

Profect of the letters testamentary.

London, to wit. *John Denn* complains of *Richard Fenn*, surviving executor of the last will and

London, to wit. *Richard Fenn*, surviving executor of the last will and testament of *Richard Roe*

Against a surviving executor.

Forms of the Courts.

and testament of *Richard Roe* deceased, of a plea, that he render to the said *John* 500*l.* of lawful, &c. which he *unjustly detains* from him, *For that whereas.*

Roe deceased, was summoned to answer *John Denn* in a plea, that he render to the said *John* 500*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him; and whereupon, &c.

If executor or administrator be sued in the debt and detinet.

If an executor or administrator be sued in the debt and detinet, then say, of a plea that he render to the said *John* 500*l.* of lawful money of *Great Britain*, which he owes to, and *unjustly detains* from him, *For that, &c.*

For an executor against an executor.

Middlesex, to wit. *John Denn*, executor of the last will and testament of *Richard Roe* deceased, complains of *Richard Fenn*, executor of the last will and testament of *Robert Wells* deceased, being in the custody of the marshal of the marshalsea of our lord the now king, before the king, himself, of a plea, that he render to the said *John*, executor as aforesaid, 100*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him, *For that whereas.*

Add, profert of the letters testamentary (as in p. 108.) and pledges.

Against an executor of an executrix,

London, to wit. *John Denn* complains of *Richard Fenn*, executor of the

London, to wit. *Richard Fenn*, executor of the last will and testament of *Robert Wells* deceased, was summoned to answer *John Denn*, executor of the last will and testament of *Richard Roe* deceased, in a plea, that he render to the said *John* 100*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him; and whereupon the said *John*, by *J. S.* his attorney, complains, *That whereas.* Add, profert of the letters testamentary.

London, to wit. *Richard Fenn*, executor of the last will and testament

the last will and testament of *H. F.* widow deceased, who was, in her life time, executrix of the last will and testament of *R. F.* her late husband deceased, being in the custody of the marshal, &c. in a plea, that he render to the said *John* 50*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him, *For that whereas.*

ment of *H. F.* widow deceased, who was, in her life-time, executrix of the last will and testament of *R. F.* her late husband deceased, was summoned to answer *John Denn* in a plea, that he render to the said *John* 50*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him; and whereupon the said *John*, by *J. S.* his attorney, complains, *That whereas.*

London, to wit. *John Denn*, and *Ann* his wife, (which said *Ann* is the executrix of the last will and testament of *Richard Dee* deceased) complain of *Richard Fenn*, being in the custody of the marshal of the marshal-see of our lord the now king, before the king himself, of a plea, that he render to the said *John* and *Ann* his wife, executrix as aforesaid, 100*l.* of lawful money of *Great Britain*, which he *unjustly detains* from him, *For that whereas.*

And the said *John*, and *Ann* his wife, bring into court here the letters testamentary of the said *Richard Dee* deceased, by which it sufficiently appears

London, to wit. *Richard Fenn*, late of, &c. was summoned to answer *John Denn*, and *Ann* his wife, (which said *Ann* is executrix of the last will and testament of *Richard Dee* deceased) in a plea, that he render to the said *John* and *Ann* his wife, executrix as aforesaid, 100*l.* of lawful money of *Great Britain*, which he *unjustly detains* from them; and whereupon the said *John* and *Ann* his wife, executrix as aforesaid, by *J. S.* their attorney, complain, *That whereas.*

For a husband and wife where the wife was executrix.

Proferet.

Forms of the Courts.

appears to the court here, that the said *Ann* is executrix of the last will and testament of the said *Richard De* deceased, and have the administration thereof, &c.

For an executor and the husband and wife co-executrix of an executor of the first testator.

London, ff. George Herne, executor of the last will and testament of *Thomas Carter* deceased, and *Thomas Smart*, and *Mary* his wife, (which said *Mary* is the co-executrix with the said *George Herne* of the last will and testament of the said *Thomas Carter*, who was the executor of the last will and testament of *Peter James* deceased,) complain of *Richard Fenn*, being in the custody of the marshal of the marshalsea, &c. in a plea, that he render to them 100*l.* of lawful money, &c. which he unjustly detains from them, For that whereas.

London, to wit. Richard Fenn, late of, &c. was summoned to answer *George Herne*, executor of the last will and testament of *Thomas Carter* deceased, and *Thomas Smart*, and *Mary* his wife, (which said *Mary* is co-executrix with the said *George Herne* of the last will and testament of the said *Thomas Carter*, who was the executor of the last will and testament of *Peter James* deceased) in a plea, that he render to them 100*l.* of lawful money of *Great Britain*, which he unjustly detains from them; and whereupon the said *George*, *Thomas*, and *Mary* his wife, by *S. U.* their attorney, complain, That whereas.

Proferet.

And they bring into court here, as well the letters testamentary of the said *Peter James*, by which the said *Thomas Carter* appears to the court here to be executor of the last will and testament of the said *Peter James*, as also the letters testamentary of the said *Thomas Carter*, by which the said *George Herne*, and *Mary Smart*, appear to the court here, to be executors of the last will and testament of the said

Thomas Carter, and have the administration thereof, &c.

Middlesex, to wit. *John Denn*, executor of the last will and testament of *Richard Gee* deceased, who was the executor of the last will and testament of *John Doe* deceased, complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, of a plea, that he render to the said *John*, executor as aforesaid, 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him, For that whereas.

C. P. London, to wit. For an executor *Richard Fenn*, late of, of an executor. &c. was summoned to answer *John Denn*, executor of the last will and testament of *Richard Gee* deceased, who was the executor of the last will and testament of *John Doe* deceased, in a plea, that he render to the said *John*, executor as aforesaid, 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him; and whereupon the said *John*, executor as aforesaid, by *J. S.* his attorney, complains, For that whereas.

And he brings into court here the letters testamentary of the said *John Doe*, by which it appears to the court here, that the said *Richard Gee* was the executor of the last will and testament of the said *John Doe*; and he also brings into court here the letters testamentary of the said *Richard Gee* deceased, by which it appears to the court here, that the said *John Denn* is the executor of the last will and testament of the said *Richard Gee*, and hath the administration thereof, &c.

Profert of the letters testamentary.

If there be but one executor, and he dies after probate of his testator, the executor of that executor shall have the action, and so *ad infinitum*.

If one executor, and he dies, his executor has the action.

But if the executor die intestate, then the administrator *de bonis non administratis*, must have the action. Dy. 24. 471. 3 Cro. 9.

I

If

Forms of the Courts.

Bishop.

If the debt be due to a bishop, parson, vicar, master of an hospital, or the like; after his death, his executors or administrators, and not his successors, shall have the action.

Body politic.

But if it is due to a body politic, as to a mayor and commonalty, dean and chapter, or the like, in their politic capacity; there the successor, not the executor, shall have it. 4 Co. 65.

Heir.

An heir cannot have the action, but as executor. F. N. B. 120.

Of Administrators.

Administrators,
how to declare
against them.

With respect to an administrator, he must be declared against on specialties in the same manner as an executor in the *detinet* only; for he is not personally liable, but only in respect of the intestate's estate, he therefore cannot be said to owe. 1 Roll. Ab. 603. However, after judgment obtained against him, one may have debt in the *debet* and *detinet*; suggesting a *devastavit*, and thereby charge him *de bonis propriis*. 2 Saund. 216. 1 Lev. 255. An administrator may be declared against, as assignee in debt for rent, for the time he enjoyed the land, and was in possession. Show. 348. Buck v. Barnard.

For an admini-
strator in debt.

Middlesex, to wit.
John Denn, admini-
strator of all and singu-
lar the goods, chattels,
rights, and credits which
were of Richard Roe de-
ceased, who died in-
testate, complains of Ri-
chard Fenn, being in the
custody of the marshal
of the marshalsea, of our
lord the now king, be-
fore

London, to wit. Ri-
chard Fenn, late of, &c.
was summoned to an-
swer John Denn, admini-
strator of all and singu-
lar the goods, chattels,
rights, and credits which
were of Richard Roe de-
ceased, who died in-
testate, in a plea, that he
render to the said John,
administrator as afore-
said,

fore the king himself, of a plea, that he render to the said *John*, administrator as aforesaid, 100*l.* of lawful money of *Great Britain*, which he unjustly detains from him, *For that whereas.*

said, 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him, &c.; and whereupon the said *John*, by *J. S.* his attorney, complains, *That whereas, &c.*

And he brings into court here, the letters of administration of the said *Richard Roe* deceased, which sufficiently proves to the court here, the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf above-mentioned.

Profert of the letters of administration.

London, to wit. John Denn, surviving administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, complains of *Richard Fenn*, being, &c. (as above). Add, at the end of the conclusion, the profert of the letters of administration, and pledges.

London, to wit. Richard Fenn, late of, &c. was summoned to answer *John Denn*, surviving administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, in a plea, &c. (as above); at the end of the conclusion add, the profert of the letters of administration.

By a surviving administrator.

And he brings into court here the letters of administration of the said *Richard Roe* deceased, which sufficiently proves to the court here the granting thereof, in form aforesaid, to the said *John* and *J. R.* deceased; and the said *J. R.* being now dead, the said *John* is the surviving administrator as aforesaid, the date whereof is on the day and year in that behalf above-mentioned.

Profert of the letters of administration.

London, to wit. John Denn complains of *Richard Fenn*, surviving administrator of all and singular

London, to wit. Richard Fenn, late of, &c. surviving administrator of all and singular the goods,

Against a surviving administrator.

Forms of the Courts.

singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, being, &c.

goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, was summoned to answer, &c.

By an administrator, against an administrator.

London, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who died intestate, complains of *Richard Fenn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Robert Wells* deceased, who also died intestate, being, &c. of a plea, that he render to the said *John* 50*l.* of lawful money of *Great Britain*, which he unjustly detains from him; *For that whereas*. Add proferret of the letters of administration to the plaintiff, and pledges.

attorney, complains, *For that whereas*, &c. Add, proferret of the letters of administration.

London, to wit. *Richard Fenn*, late of, &c. administrator of all and singular the goods, chattels, rights, and credits which were of *Robert Wells* deceased, who died intestate, was summoned to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Richard Roe* deceased, who also died intestate, in a plea that he render to the said *John*, administrator as aforesaid, 100*l.* of lawful money of *Great Britain*, which he unjustly detains from him; and whereupon the said *John*, administrator as aforesaid, by *J. S.* his

For a husband and wife, where the wife was administratrix.

London, to wit. *John Denn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods, chattels, rights, and credits which were of *Richard Doe*,

London, to wit. *Richard Fenn*, late of, &c. was summoned to answer *John Denn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular

Doe, her late husband, deceased, who died intestate,) complain of *Richard Fenn*, being, &c. of a plea, that he render to the said *John*, and *Ann* his wife, administratrix as aforesaid, 50*l.* of lawful money of Great Britain, which he unjustly detains from them, For that whereas,

gular the goods, chattels, rights, and credits which were of *Richard Doe*, her late husband, deceased, who died intestate,) in a plea, that he render to them 100*l.* of lawful money of Great Britain, which he unjustly detains from them; and whereupon the said *John*, and *Ann* his wife, administratrix as afore-

said, by *J. S.* their attorney, complain, That whereas, &c.

And they bring into court here, the letters of administration of the said *Richard Roe*, which sufficiently proves to the court here the granting thereof in form aforesaid, the date whereof is the day and year in that behalf above-mentioned.

Protest of the letters of administration.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods, chattels, rights, and credits which were of *John Roe*, her late husband deceased, who died intestate,) of a plea, that they render to him 50*l.* of lawful, &c. which they unjustly detain from him, For that whereas, &c. Add pledges.

Middlesex, to wit. *Richard Fenn*, and *Ann* his wife, (which said *Ann* is the administratrix of all and singular the goods, chattels, rights, and credits, which were of *John Roe*, her late husband deceased, who died intestate,) were summoned to answer *John Denn* in a plea, that they render to him 50*l.* of lawful money of Great Britain, which they unjustly detain from him; and whereupon the said *John*, by *J. W.* his attorney, complains, That

Against a husband and wife, where she is administratrix.

whereas, &c.

Forms of the Courts.

For an administrator, during the minority of the executor.

*London, to wit. John Denn, administrator of all and singular the goods, chattels, rights, and credits which were of J. K. deceased, (during the minority of J. G. executor named in the last will and testament of the said J. K. deceased,) complains of Richard Fenn, being, &c. of a plea, that he render to the said John, administrator as aforesaid, 50*l.* of lawful, &c. which he unjustly detains from him, For that whereas, &c.*

*Middlesex, to wit. Richard Fenn, late of &c. was summoned to answer John Denn, administrator of all and singular the goods, chattels, rights, and credits which were of J. K. deceased, during the minority of J. K. executor of the last will and testament of the said J. K. in a plea, that he render unto him 50*l.* of lawful, &c. which he unjustly detains from him; and whereupon the said John, administrator aforesaid, by J. W. his attorney, complains, That whereas, &c.*

Profect of the letters of administration.

And he brings into court here the letters of administration of the said J. K. by which it sufficiently proves to the court here, the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf above-mentioned.

Against an administrator, during the minority of the executor.

*London, to wit. John Denn complains of Richard Fenn, administrator of all and singular the goods, chattels, rights, and credits, which were of J. K. deceased, during the minority of J. G. executor of the last will and testament of the said J. K. being, &c. of a plea, that he render to the said John, 50*l.* of lawful, &c. which he unjustly detains from*

*London, to wit. Richard Fenn, administrator of all and singular the goods, chattels, rights, and credits which were of J. K. deceased, during the minority of J. K. executor of the last will and testament of the said J. K. was summoned to answer John Denn, in a plea, that he render to him 50*l.* of lawful money, &c. which he unjustly*

from him, &c. *For that justly detains from him ;*
whereas. and whereupon the said
John, by J. W. his at-
 torney, complains, *That whereas, &c.*

London, to wit. *John*
Denn, administrator of
 all and singular the
 goods, chattels, rights
 and credits, which were
 of *Richard Roe* deceased,
 at the time of his
 death unadministered by
Simon Franks deceased,
 administrator of all and
 singular the goods, chat-
 tels, rights, and credits
 of the said *Richard Roe*,
 complains of *Richard*
Fenn, being, &c. of a
 plea, that he render to
 the said *John*, adminis-
 trator as aforesaid, 50*l.*
 of lawful money of *Great*
Britain, which he *un-*
justly detains from him,
for that whereas.

London, to wit. *Rich- For an admini-*
ard Fenn, late of, &c. was *strator de bonis*
 summoned to answer *non.*
John Denn, administra-
 tor of all and singular
 the goods, chattels, rights,
 and credits, which were
 of *Richard Roe* deceased,
 unadministered by *Simon*
Franks deceased, admin-
 istrator of all and sin-
 gular the goods, chat-
 tels, rights, and credits
 of the said *Richard Roe*,
 in a plea, that he render
 to the said *John*, admini-
 strator as aforesaid, 50*l.*
 of, &c. which he *unjustly*
detains from him ; and
 whereupon the said *John*,
 administrator as afore-
 said, by *J. S.* his attor-
 ney, complains, *That*
whereas.

And he brings into court here, the said letters of *Proffert.*
 administration of *the unadministered goods* of the
 said *Simon Franks* deceased, which sufficiently
 proves to the court here, the granting thereof
 in form aforesaid, the date whereof is the
 same day and year in that behalf above-men-
 tioned.

London, to wit. *John*
Denn complains of *Rich-*
ard Fenn, administrator
 of all and singular the
 goods,

London, to wit. *Rich- Against an ad-*
ard Fenn, administrator *ministrato de*
 of all and singular the *bonis non.*
 goods, chattels, rights,
 I 4 and

Forms of the Courts.

goods, chattels, rights, and credits which were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, administrator of all and singular the goods, chattels, rights, and credits which were of the said *Richard Roe*, being, &c. of a plea, that he render to the said *John*, 50*l.* of lawful money of Great Britain, which he unjustly detains from him, For that whereas.

and credits, which were of *Richard Roe* deceased, unadministered by *Simon Franks* deceased, administrator of all and singular the goods, chattels, rights, and credits which were of the said *Richard Roe*, was summoned to answer *John Denn*, in a plea, that he render to him the said *John*, 50*l.* of lawful money, &c. which he unjustly detains from him, &c.; and whereupon the said *John*, &c.

An administrator *pendente lite*.

An administrator *pendente lite* about a will, may bring actions. *Woolleston v. Walker*, 2 Str. 917. 2 P. W. 576. In such case, state him administrator, in the words of the administration.

Administration during absence.

If administration during the absence of J. S. (who is executor) be granted, and an action be brought by him, the declaration stating that it was granted, *debita legis forma durante absentia*, is good, and the count will imply that it is intended an absence beyond sea; but it is necessary to shew, that such absence continues. 6 Mod. 304. 3 Salk. 23. 1 Salk. 42.

For an administrator, with the will annexed.

London, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits, which were of *Joseph Dix* deceased, with the will of the said *Joseph Dix* annexed, complains of *Richard Penn*, being, &c. of a plea, that he render to him

London, to wit. *Richard Penn*, late of, &c. was summoned to answer *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *Joseph Dix* deceased, with the will of the said *Joseph Dix* annexed, in a plea, that he render to him

him administrator as him the said *John*, administrator as afore-
afore-*said*, 5*ol.* of lawful, 5*ol.* of, &c. which he *un-*
&c. which he *unjustly de-* *justly detains* from him; *For that*
whereas. and whereupon the said
John, administrator as
afore-*said*, complains, *That whereas.*

And he brings into court here the letters of ad- *Profero.*
ministration of the said archbishop, with the will
annexed of the said *J seph Dix*, which sufficiently
prove to the court here, the granting thereof in
form afore-*said*, the date whereof is the same day
and year in that behalf above-mentioned.

London, to wit. *A. B.*
complains of *C. D.* be-
ing, &c. in a plea of
trespass on the case, *For*
that whereas, the said *C.*
D. on the 1*st* day of
November in the year of
our Lord 1793, to wit,
at *London* afore-*said*, in
the parish of *St. Mary-*
le-Bow, in the ward of
Cheap, was indebted to
the said *A. B.* and one *C.*
H. his partner, (which
said *C. H.* the said *A. B.*
suggests to the court here
according to the form
of the statute in such
case made and provided,
since the issuing of the
writ of *latitat* against the
said *C. D.* at the suit of
them the said *A. B.* and
C. H., to wit, on the 5*th*
day of *November* in the
year afore-*said*, at *Lon-*
don

London, to wit. *C. D.* Form of decla-
ration, suggest-
ing the death of
one of the plain-
tiffs, after the
writ sued out.
late of, &c. was sum-
moned to answer *A. B.*
and *E. F.* in a plea of
trespass on the case; and
whereupon the said *A. B.*
by *J. U.* his attorney,
comes, and the said *E.*
F. cometh not, and the
said *A. B.* gives the court
here to understand and
be informed, that after
the issuing the original
writ, and before this
day, to wit, on the 16*th*
day of *Nov.* in the year
of our Lord 1793, at
London afore-*said*, to wit,
in the parish of *St. Mary-*
le-Bow, in the ward of
Cheap, the said *E. F.*
died, and the said *A. B.*
survived him, which the
said *C. D.* doth not deny;
and whereupon the said
A. B. by his said attor-
ney

Forms of the Courts.

don aforesaid, &c. died; *ney* complains, *For that* and the said *A. B.* sur- *whereas.*
vived him, which the said
C. D. doth not deny, in 20*l.* of lawful, &c.

This suggestion is entered in pursuance of the statute of 8 and 9 *W. 3.* c. 10. s. 7. which enacts, If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action survives on the death of one of the plaintiffs, or against the surviving defendants, the action shall not abate; but such death being suggested on the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants. 8 *Mod.* 115. *Andr.* 57.

Suggestion where there were several defendants and one died, before the statute.

Before this statute it was held, that if there were several defendants in the original action, and one died, the suit did not abate; because there being a joint demand, it served against the residue: but in this case there must have been a suggestion on the roll, because it would be error to give judgment against a deceased person. *Hard.* 151. 164. *Stile* 259. 3 *Mod.* 249.

Declaration against two defendants, where one died after writ sued out, and before declaration.

Middlesex, to wit. *A. B.* complains of *C. D.* being in the custody of the marshal of the marshalsea, &c. of a plea of trespass on the case, *For that whereas* the said *C. D.* and one *E. F.* his partner, (which said *E. F.* the said *A. B.* suggests to the court here, according to the form of the statute in such case made and provided, since the issuing the writ of *latitat* against them, the said *C. D.* and *E. F.* to wit, on the 30th day of *October* in the year of our Lord 1793, at *Westminster* in the said county, died, and the said *C. D.* survived him, which the said *C. D.* doth not deny) on the 20th day of *September* in the year aforesaid, at *Westminster* aforesaid, were indebted to said *A. B.* in 20*l.* &c.

For an administrator during the infancy of a child who is not executor.

Middlesex, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits which were of *J. K.* deceased, during the minority

minority of *A. B.* an infant, who is under the age of 21 years, the natural and lawful daughter of the said *A. B.*, complains of *Richard Fenn*, being in the custody, &c. of a plea, that he render to the said *John*, administrator as aforesaid, 100*l.* of lawful, &c. which he *unjustly detains* from him, &c. *For that whereas, &c.*

In an action by an administrator, *durante minori etate* of *A.* who is no executor, but only entitled to administration, it is sufficient if the administrator alleges that *A.* is under 21 years, for in such case, the administration does not determine at the age of 17. 1 *Ld. Ray.* 667. *Com.* 159.

against
marshal.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, esquire, marshal of the marshal-sea, of our lord the now king, before the king himself, present here in court, in his own proper person, in a plea, that he render to the said *John*, 600*l.* of lawful money of *Great Britain*, which he owes to, and unjustly detains from him, *For that whereas, &c.* to the said *John*, his damage of 80*l.* &c. and therefore he brings his suit. Add pledges.

Middlesex, to wit. *Richard Fenn*, by *R. T.* his attorney, complains of *John Denn*, Esq. warden of the prison of the fleet of our sovereign lord the king, present here in court in his own proper person, in a plea, that he render to him 100*l.* of lawful, &c. which he owes to, and *unjustly detains* from him, *For that whereas, &c.* to the said *Richard*, his damage of 50*l.* and therefore he prays relief, &c. Add pledges.

Bill against the
warden of the
fleet.

as assignee
of the
estate, on a
bill.

London, to wit. *John Denn*, assignee of *A. B.* Esq. and *C. D.* esq. sheriffs of the city of *London*, according to the form of the statute in such case made and provided, complains of *Richard*

Middlesex, to wit. *Richard Fenn*, late of *London*, grocer, was summoned to answer *John Denn*, assignee of *A. B.* Esq. and *C. D.* Esq. sheriff of the county of *Middlesex*, according to the

Penalty.

Richard Fenn, being, &c. the form of the statute of a plea, that he render in such case made and provided, of a plea, that to the said *John*, assignee as afore- said, 50*l.* of law- ful money, &c. which he owes to and *unjustly detains* from him, *For that whereas, &c.* to the said *John*, assignee as afore- said, his damage of 10*l.* and therefore he brings his suit, &c. *John*, assignee as afore- said, 500*l.* of lawful, &c. which he owes to and *unjustly detains* from him, and whereupon the said *John*, assignee as afore- said, by *J. W.* his attorney, complains, *That whereas.*

Vide *stat.* 4 and 5 *Ann.* c. 16. s. 20. which gives the action, and it must be brought in the same court from whence the process issued. 1 *Burr.* 642. 3 *Burr.* 1923.

Heirs.**By an heir.**

In an action *by an heir*, who sues upon a grant or covenant to his ancestor and his heirs, he must be named heir, 1 *Salk.* 355; and he must declare in the *debet* and *detinet*, 47 *Ed.* 3. 23. b.

Against an heir.

In an action *against an heir*, the defendant must be named heir; but it is sufficient if he be named so in the count. *Reg.* 140. a. And so against the heir of an heir, it must be shewn how *heir* specially. *Cro. Car.* 151. If it be against an heir in gavel-kind, it shall be against *all the sons together.* *Bendlb.* pl. 205.

Not liable fur-
ther than the
value of the
lands.

The declaration *against the heir on the bond of his ancestor*, shall be in the *debet* and *detinet.* *Plow. Comm.* 441. *Dy.* 344. b. 1 *Lev.* 130.

An heir that hath lands by hereditary descent shall not be liable for the debt of his ancestor, further than to the value of the lands descended; and as soon as he hath paid his ancestor's debts, to the value of the lands descended, he shall hold the land discharged; otherwise he might be charged *ad infinitum.* *Str.* 665. The executor shall reimburse him as far

far as there are personal assets of the testator come to his hands, if not otherwise ordered by the will. 2 P. W. 175. The part which the testator permits to descend to his heir, shall be first applied to pay the bond debts. 3 P. W. 367.

If the ancestor devises away his lands to a *stranger*, Devisee and dies indebted by bond, or other specialty, the ^{heir.} lands shall be liable in the hands of the devisee, and the action shall be brought *against him and the heir jointly*. Stat. 3 and 4 W. and M. c. 14. Vide 2 Str. 1270.

London, to wit. *John Denn* complains of *Richard Fenn, son and heir of John Fenn*, his late father, deceased, being, &c. of a plea, that he render to the said *John* 50*l.* of lawful money of *Great Britain*, which he owes to, and *unjustly detains* from him, *For that* whereas, &c.

London, to wit. *Ri-* Against an heir.
chard Fenn, late of, &c. Esq. *son and heir of John Fenn*, his late father, deceased, was summoned to answer *John Denn*, in a plea, that he render to him 50*l.* of lawful, &c. which he owes to, and *unjustly detains* from him, and whereupon, &c.

If the *heir* and *devisee* be *sued jointly*, the de- If against heir
claration must state the one to be *heir*, and the and devisee.
other *devisee* of the testator.

Of Bankrupts.

The assignees, standing in the place of the bank- Assignees stand
rupt, are invested with all the *rights of the property* in place of
of the bankrupt, and may bring actions for it, and bankrupts.
declare as *assignees* for all demands due on the bank-
rupt's contract, *before the act of bankruptcy*. 3 Wils.
307. But for all demands on contracts, entered
into by the bankrupt, *after a bankruptcy* committed,
they may bring the action *in their own name*; for
after the bankruptcy, the bankrupt is to be considered
but as their agent. Cowp. 570. *Evans v. Mann*.

By the assignees
of a bankrupt.

London, to wit. *John Denn* and *Richard Roe*, assignees of the estate and effects of *John Doe* a bankrupt, according to the force, form, and effect of the several statutes made concerning bankrupts, complain of *Richard Fenn*, being, &c. of a plea, that he render to them, 500*l.* of lawful, &c. which he owes to and *unjustly detains* from them, *For that whereas*, &c. to the said *John* and *Richard*, assignees as aforesaid, their damage of 10*l.* and therefore they bring their suit, &c. Add-
pledges.

Middlesex, to wit. *Richard Fenn*, late of, &c. was summoned to answer *John Denn* and *Samuel Roe*, assignees of the estate and effects of *John Doe* a bankrupt, according to the force, form, and effect of the several statutes made concerning bankrupts, in a plea, that he render to them, as assignees as aforesaid, 500*l.* of lawful, &c. which he owes to and *unjustly detains* from them; and whereupon the said *John* and *Samuel*, assignees as aforesaid, by *J. W.* their attorney, complain, *That whereas*.

Against the late
sheriff, for an
escape on mesne
process.

Oxfordshire, to wit. *John Denn* complains of *C. J.* esquire, late sheriff of the county of *Oxford*, being, &c. in a plea of trespass on the case, *For that whereas*.

Oxfordshire, to wit. *C. J.* late of *Oxford*, in the said county, esquire, late sheriff of the said county, was attached to answer *John Denn*, in a plea of trespass on the case, &c.

If escape in ex-
ecution, or on
capias ut lega-
tum, &c.

If it be for an escape *in execution*, then the action is *in debt*: And an action *on the case* lies for an escape of one taken on a *capias ut legatum*. *Lutw.* 109. So for an escape on a writ of *excommunicato capiendo*. *1 Lutw.* 121. *Hob.* 317. *1 Roll. Abr.* 110.

If the action be against the *present* sheriff, then leave out the word *late*.

What declara-
tion ought to
shew.

The declaration in an action for misfeasance *in an office*, must shew that the defendant was
an

an officer; that it was his duty to do, and that he acted *contrary to his duty*. *Com. Rep.* 132. 1 *Ld. Ray.* 904. *vide* 2 *Cro.* 255; where if the declaration shews *the misfeasance*, it is sufficient, though it omits several circumstances not material.

If against the bailiff of a liberty say, complains *Against bailiff of J. B. esq. bailiff of the liberty of the dean and chapter of the collegiate church of St. Peter Westminster, in the county of Middlesex.*

London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself; *For that whereas* (add pledges of prosecution, *John Doe, and Richard Roe*).

London, to wit. *John Fenn*, late of *London*, yeoman, was attached to answer *John Denn* in a plea, wherefore he entered into one messuage (set forth the writ part); then say, and other wrongs to him did, to the great damage of the said *John*, and against the peace of our lord

Form of a declaration in ejectment, by bill.

the now king; whereupon the said *John* by *J. S.* his attorney, complains, *For that whereas*.

Staffordshire, ss. *Jane Brookes*, widow, who was the wife of *John Brookes*, Esq. deceased, by *John Simpson* his attorney, demandeth, against *B. C.* the third part of thirty messuages, and two hundred acres of land, and common pasture, with the appurtenances in *B.* in the said county, as her dower of the endowment of the said *John* heretofore her husband, by writ of our lord the king, of dower, whereof she hath nothing, &c.

Declaration in dower. C. P.

The writ of dower is returnable in the common bench, and the process upon it, is summons, *grand*, and *petit cape*. *F. N. B.* 140. At the return of the summons, the defendant may cast an effoign, but it must be entered upon the effoign-day of the same return, or the demandant may enter a *ne recipiatur*.

Forms of the Courts.

cipiatur, and the demandant must adjourn the effoign until the 5th return after ; in default of appearance, a grand cape issues.

Proclamation must be made 14 days before the return of the summons, or the grand cape shall be set aside. *Barn. 1.*

On Scire Facias.

Declaration on
a *scire facias*.

Middlesex, to wit.
Our lord the king sent to his sheriff of *Middlesex*, his writ, closed in these words, to wit : to the end of the entry of the *sci. fa.* and sheriff's return, if there be one only used, (if two, to the end of the entry of the second *sci. fa.* and sheriff's return ;) then say, and the said *A. B.* prays execution against the said *C. D.* for the debt and damages aforesaid, to be adjudged to him ; &c ; and the said *C. D.* on that day, being solemnly called, comes by *S. U.* his attorney ; and thereupon the said *A. B.*

prays that execution may be adjudged to him, of the debt and damages aforesaid, according to the force, form, and effect of the said recovery, &c.

In case the *sci. fa.* be by an executor or administrator, the profer of the will, or administration, must be added at the end of the declaration, or defendant may demur specially.

Middlesex, ff. It was commanded to the sheriff, whereas, (to the end of the entry of the *sci. fa.* and sheriff's return) ; then say, and the said *A. B.* prays execution against the said *C. D.* for the debt and damages aforesaid, to be adjudged to him, &c ; and the said *C. D.* on that day, being solemnly called, comes by *J. D.* his attorney ; and thereupon the said *A. B.* prays that execution may be adjudged to him, according to the force, form, and effect of the said recovery, &c.

Quare

Quare Impedit.

London, to wit. Frederick archbishop of Can-
terbury, and William Backhouse clerk, were sum-
moned to answer the wardens and commonalty <sup>Form of a
declaration in
quare impedit.</sup> C. P.
of the mystery of grocers of the city of London,
of a plea, that they permit the said wardens
and commonalty, to present a fit person to the
church of Saint Mary-le-bow, with the churches of
Saint Pancras Soper-lane, and All-hallows, Honey-
lane, thereunto annexed, which is vacant and be-
longs to the gift of the said wardens and com-
monalty as they say; and thereupon the said
wardens and commonalty by G. W. their attorney,
say, *That whereas, &c.* whereupon the said wardens
and commonalty say that they are injured, and
have sustained damage to the value of 200*l.*, and
therefore they bring suit, &c.

All writs of *advowson* of a church, viz. *rights of
advowson, quare impedit*, and *assize of darrein pre-
sentment*, by a common person, shall be in the
common bench. *Reg.* 29, 30. But a *quare im-
pedit* by the king, may be in *K. B.* or *C. B.*
F. N. B. 32. *É.* And by the common law, the
process is summons, attachment, and distress.

The sheriff ought to make summons by good
summoners, and return their names upon the origi-
nal. 1 *Brownl.* 158. It shall be served upon the
defendant, or at the church-door. 2 *Mod.* 265.

If one defendant appears before the other, the
plaintiff may declare against him *simul cum T.*
1 *Brownl.* 159.

If defendant casts an *essoign*, the plaintiff ought
to adjourn it for 15 days, otherwise he shall be
non-suited. *Ibid.* *Dalt.* 81.

The Forms of Præcipes for different Originals.

These writs are *optional* or *peremptory*; they are either a *præcipe*, or a *fi te fecerit securum*. The *præcipe*, is in the alternative, commanding the defendant to do the thing required, or shew the reason why he hath not done it. The use of this writ is, where something *certain* is demanded by the plaintiff, which is in the power of the defendant himself to perform; as to *restore* the possession of land, *to pay a certain liquidated debt (as upon bond) to perform a specific covenant, to render an account, and the like*; in all which cases the *præcipe* is drawn up in the *form of a command to do thus, or shew cause to the contrary*.

Præcipe in covenant.

Middlesex, ss. Command Richard Fenn, late of Westminster in the said county, esq., that he justly, &c. perform to John Denn the covenant made between them, according to the force, form, and effect of a certain indenture made between them. Returnable on the morrow of All Souls, wherefore, &c. (If in C. P. say, ret. before the king's justices of Westminster, on the morrow of All Souls).

In debt.

London, ss. Command Richard Fenn, late of, &c. merchant, that justly, &c. he render to John Denn, 100l. of lawful money of Great Britain, which he owes to and unjustly detains from him, &c. Returnable, &c.

For an executor in debt.

London, ss. Command Richard Fenn, late of, &c. that he render to John Denn, executor of the last will and testament of James Dee deceased, 50l. of lawful money of Great Britain, which he unjustly detains from him, &c. Returnable, &c.

In account.

London, to wit. Command Richard Fenn, late of, &c. gentleman, that he render to John Denn, his reasonable account for the time in which he was receiver of the money of him the said John, &c.
For

For the time in which he was bailiff of him the If a bailiff.
said John, in E.

For the time in which he was his bailiff in E., If a bailiff and
and receiver of the money of him the said *John,* receiver.

Surry, to wit. Command Richard Fenn, late In annuity.
of, &c. yeoman, that he render unto *F. G.* 100*l.*
of lawful money of *Great Britain*, which to him
are in arrear of a certain annual rent of 50*l.* which
he owes to, and unjustly detains from him, &c.

The *præcipe si se fecerit securum* directs the sheriff *Præcipe si se fa-*
to cause the defendant to appear in court, without *cerit securum.*
any option given him, provided the plaintiff gives
the security effectually to prosecute his claim.

This writ is used where nothing *specifically is de-*
manded, but only a satisfaction in general; such are
writs of *trespass*, or on the case, wherein no debt or
other *specific thing is sued for in certain*; but only
damages, to be assessed by a jury.

Middlesex, ff. If John Denn make you secure, *Præcipe for*
&c. then put, &c. *Richard Fenn,* late of, &c. yeo- *special original*
man, that he be before us at *Westminster*, on the *in case.*
morrow of All Souls, wheresoever, &c. (if in the
common pleas say, before our justices at *Westminster*,
on the morrow of All Souls,) to shew; *For that*
whereas, (here set forth the whole complaint,) to
the said *John* his damage of 100*l.* as is said, &c.

In trespass, assault, and assault and imprisonment,
the general method is to take the declaration to the
curfitor for the original, who makes out the *common*
original.

The great seal was a check on the courts of
king's bench, and common pleas, to know what
cause was there, and likewise that the *finis*, for
having justice there, should be answered in the
court of chancery, before there were any proceed-
ings. These *finis* were in the nature of composition. *Gill. C. P. 7.*
tions, for private persons suing in the king's courts,
in order to have the best and most speedy and
proper justice. In actions of debt, the fine was
paid on taking out the original; but the fines in
trespass, were not upon taking out the writs, but
they

In trespass,
ejectment, af-
fault, and im-
prisonment.

they were according to the nature of the tort in judgment: hence it was, that all matters of debt might be put in the same action, because the fine upon the original was in proportion to the sum demanded; but they did not mingle debt and trespass, because the fine upon the trespass was in the judgment; also the judgment in debt and trespass was different, and therefore they could not be mingled in the same original; for upon the action of debt they had only an amercement which was assessed in the county, but upon a trespass, the court set a fine, and levied it by a *capiatur*. 5 Rep. 49. But now, by stat. 5 and 6 W. and M. c. 12. no writ of *capias* shall issue for this fine; but the plaintiff shall pay 6s. 8d., and be allowed it against the defendant amongst his other costs.

It is uncertain when fines upon originals arose; yet it is certain they were to purchase leave to prosecute in the king's courts, and they became a considerable profit to the king's courts; seeing that if the debt or damages specified in the original exceeded 40*l.*, a fine of a mark was to be paid to the king, and so proportionably for a larger sum.

Fines on ori-
ginals.

	£.	s.	d.
From 40 <i>l.</i> to 100 marks	0	6	8
From 100 marks to 100 <i>l.</i>	0	10	0
From 100 <i>l.</i> to 200 marks	0	13	4
From 133-6-8 to 166-13-4	0	16	8
From 166-13-4 to 200	1	0	0
For every 100 marks more	0	6	8
For every 100 <i>l.</i> more	0	10	0

A mark is 13s. 4d. a noble 6s. 8d.

Forms of the Declaration in the Court of Exchequer.

Of the court.

This court is inferior in rank not only to the court of king's bench, but to the common pleas also. It is a very ancient court of record, set up by
William

William the Conqueror as a part of the *aula regia*, though regulated and reduced to its present form by king *Ed. 1.*, and intended only principally to order the revenues of the crown, and to recover the king's debts and duties. 4 *Inst.* 103, 116. As by a fiction, almost all sorts of civil actions are now allowed to be brought in the king's bench; in like manner, by another fiction, all kinds of personal suits, may be prosecuted in the court of exchequer. —For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing, and being sued only in their court, so also the king's debtors and farmers, and all accountants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity, that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty is concerned) as are prosecuted in the court of common pleas. This gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accountants, and is exercised by the barons only of the exchequer, and not the treasurer, or chancellor.

The writ upon which all proceedings here are grounded, is called a *capias quo minus*; in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of, *quo minus sufficiens existet*, by which he is less able to pay the king his debt or rent; and these suits are expressly directed, by *stat. 10 Ed. 1. c. 11. to be confined to such matters only as specially concern the king, or his ministers of the exchequer.* And by *28 Ed. 1. c. 4.* it is enacted, that no common pleas be thenceforth holden in the exchequer contrary to the form of the great charter. But now by the suggestion of privilege, any person may be admitted to sue in the exchequer, as well as the king's accountant. The surmise of being debtor to the king is there-

Forms of the Courts.

fore become a matter of form, and mere words of course, and the court is open to all the nation equally.

Seven courts,

In the *exchequer* there are seven courts: 1. the court of pleas; 2. the court of accounts; 3. the court of receipt; 4. the court of exchequer-chamber, being the assembly of all the judges in *England* for matters of law; 5. the court of exchequer-chamber, for error in the court of exchequer, 31 *Ed.* 3. c. 8. 31 *Eliz.* ch. 1.; 6. the court of exchequer-chamber, for error in the king's bench, 27 *El.* c. 8. 31 *El.* c. 1.; 7. the court of equity in the exchequer-chamber. 4 *Inst.* 119.

All judicial proceedings according to law, in the exchequer, are *coram baronibus*, and not *coram thesaurario et baronibus*; but the court of equity holden in the exchequer-chamber, is holden before the lord treasurer, chancellor, and barons. 4 *Inst.* 109.

Subpœna.

Besides the writ of *quo minus*, actions are commenced by *subpœna ad respondendum*, which is said to be in *favorem justitiæ*. And it appears that the actions most anciently commenced, were by the writ called *venire facias ad respondendum*; several writs of *venire* were issued in the time of *Ed.* 3.

Venire facias ad respondendum.

The course of this court of filing bills.

The course of the exchequer hath been, that bills have been filed against all officers as accountants, as present in court, in any respect accountable to the king, before the barons of the exchequer; and in ordinary cases, the plaintiff's attorney delivers to the defendant's attorney, a draft of his bill (on the defendant's being brought into court by appearance or special bail), who shall indorse the day thereon, and return the said bill copied unto the plaintiff's attorney, who shall ingross it on parchment, and file same of that term, wherein the appearance is entered, or bail filed.

The form of the bill.

London; to wit. John Dent, debtor of our lord the now king, cometh here, before the barons of this exchequer, on the 6th day of *November* in this same term, by *Philip Burton*, his attorney, and
cont-

complaineth by bill against *Richard Fenn*, present here in court the same day, of a plea of trespass on the case, *For that whereas*, (to the end of the declaration,) to the damage of the said *John*, of 50*l.*; whereby he is the less able to satisfy his said majesty the debts which he oweth him, at his said exchequer, and therefore he bringeth his suit, &c. pledges to prosecute *John Doe* and *Richard Roe*.

Of the Petty Bag.

The high court of chancery is the most important of any of the king's superior and original courts of justice. ^{Of the high court of chancery.} It has its name of *chancery*, *cancellaria*, from the judge who presides here, the lord chancellor, or *cancellarius*, who, *Sir Edward Coke* tells us, is so termed à *cancellendo*, from cancelling the king's letters patent, when granted contrary to law, which is the highest point of his jurisdiction, 4 *Inst.* 88. and over and above the vast extensive jurisdiction which he exercises in his judicial capacity in the court of chancery; wherein, as in the exchequer, there are two distinct tribunals; the one ordinary, being a court of common law; the other extraordinary, being a court of equity. The ordinary legal court is much more ancient than the court of equity; its jurisdiction is to hold plea upon a *scire facias*, to repeal and cancel the king's letters patent when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*, partitions in chancery, or *scire facias* upon recognizances in this court, writs of *audita querela*, and *scire facias*, in nature of an *audita querela*, to avoid executions in this court; traverses of offices, and the like; when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right; 4 *Rep.* 54. 4 *Inst.* 79.; on proof of which, as the king can never be supposed

Petty bag,

posed intentionally to do any wrong, the law questions not, but he will immediately redress the injury, and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court, to hold plea of *all personal actions*, where *any officer or minister of the court is a party*; 4 *Inst.* 80. It might likewise hold plea by (*scire facias*) of partitions of lands in coparcenary, and of dower, *Co. Lit.* 171, where any ward of the crown was concerned in interest, so long as the military tenure subsisted; as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger against the grantee of the crown, *Bro. Abr.* 10, and of executions on statutes, or recognizances, in nature thereof, by *stat.* 23 *H. 8. c. 6.* 2 *Roll. Ab.* 469. But if any cause comes to issue in this court, that is, if *any fact* be disputed between the parties, the chancellor cannot try it, having no power to summon a jury, but must deliver the record *propria manu* into the court of *King's Bench*, where it shall be tried by the country, and judgment shall be there given thereon. *Cro. Jac.* 12. But if there be a demurrer in law, it shall be argued and adjudged in this court, 4 *Inst.* 80; and when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal, lies out of this ordinary court into the court of king's bench, *Dy.* 315. 4 *Inst.* 80. (*vide* 1 *Vern.* 131, against this opinion, but not well founded). 18 *Ed.* 3. 25 *Aff.* 24. 29 *Aff.* 47. 1 *Roll.* 287. In this ordinary or legal court, is also kept the *officina justitiæ*, out of which all the original writs that pass the great seal, &c. do issue. These writs (relating to the business of the subject) and their returns to them were, according to the simplicity of ancient times, originally kept in a *hamper*, in *banaperio*,—and the others (relating to such matters wherein the crown is immediately concerned) were preserved in a little sack or bag, in *parvâ bagâ*; and thence hath arisen the distinction of the *banaperio*.

per-office, and *petty-bag* office, which doth belong to the common law court in chancery. There are clerks of the *petty-bag*, and six attorneys. And the proceeding in all *personal actions* by or against any officer or minister of the court of chancery is *by bill filed*; and after trial had, the record is to be remanded in the chancery, and there judgment is to be given, but the execution is made returnable in the king's bench.

The legal proceedings are not enrolled on the rolls, but remain *in filaciis*, being filed up in the office of the *petty-bag*. 18 Ed. 3. c. 25. 4 Inst. 80.

Where there is a demurrer to part, and issue in part, the record being in the *K. B.*, it is said, that court ought to give judgment, because there can be but one execution. But if the demurrer be argued first, this may be done in the chancery, and afterwards the issue may be sent to be tried in the *B. R.* 1 Lev. 283. *Jefferson v. Dawson*, 2 Saund. 23.

London, to wit. *Richard Roe* was attached to answer *John Doe* gent., one of the clerks of *Nehemiah Winter* esq., one of the six clerks of the court of chancery of our sovereign lord the now king, according to the liberties and privileges of the same court, for such clerk and other officers and ministers of the same court, from time whereof the memory of man is not to the contrary hitherto used and approved of in the same, in a plea, *For that whereas*, &c. to the damage of the said *John* of 50*l.*, and therefore he prays remedy, &c.

Middlesex, to wit. *John Doe* esq. one of the clerks of the *petty-bag* in his majesty's court of chancery, according to the liberties and privileges of the same court for such clerk and other officers and ministers of the same court, from time whereof the memory of man is not to the contrary hitherto used and approved of in the same, present here in court, in his own proper person, as assignee of *A. B.* esq., and Sir *W. T.* knight, sheriff of the county of *Middlesex*, according to the form of the statute in such case made and provided, complains of *J. A.* of a plea,

Demurrer to part, and issue in part.

Form of a bill by a sixty clerk against a common person, sued by attachment of privilege.

For a clerk of the petty-bag as assignee of sheriff against defendant on a bail bond.

plea, that he render to the said *John*, as assignee as aforesaid, 69*l.* which he owes to, and unjustly detains from him, *For that whereas*, &c. to the said *John* as assignee as aforesaid, his damage of 10*l.* and therefore he brings his suit, &c. Pledges, &c.

By a fix clerk
against a fixty
clerk.

Middlesex, ff. *William Luther Sewell* esq., one of the fix clerks of the court of chancery of our lord the now king, complains of *Richard Roe* gentleman, one of the clerks of him the said *William Luther*, now present here in court, in his own proper person, in a plea of trespass on the case, *For that whereas*, &c. to the damage of the said *Luther Sewell* of 50*l.*, and therefore he prays remedy, &c. add pledges.

By a common
person against a
fixty clerk.

Middlesex, to wit. *John Doe*, by *Walden Henry Hanmer* esq. his attorney, complains of *Thomas Roe* gent. one of the clerks of *Nehemiah Winter* esq. one of the fixty clerks of the court of our lord the now king, present here in court, in his own proper person, of a plea of trespass on the case, *For that whereas*, &c. to the said *John* his damage of 100*l.*, and therefore he prays relief, &c. pledges, &c.

Of Time and the Term.

Time how computed, inclusive or exclusive.

THE space of a year is a determinate, and well-known period, consisting commonly of 365 days; for tho' in bissextile, or leap years, it consists properly of 366, yet, by stat. 21 H. 3. the increasing day in the leap year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous, there being in common use two ways of calculating months: either as *lunar*, consisting of 28 days, the supposed revolution of the moon, 13 of which make a year; or as *calendar months*, commencing at the calends of each month, whereof in a year there are only 12.

A month in law is a lunar month, or 28 days, unless otherwise expressed.

In all cases where a *statute* speaks of a *month*, it shall be intended of a *lunar* month, which contains 28 *days*, and not of any other. 2 Roll. 521. l. 50. 2 Cro. 167.

As upon stat. 2 Ed. 6. c. 13. which requires proof of any question for a prohibition to be made *within* 6 months, the computation shall be made by *lunar* months. 2 Roll. 521. l. 52. Hob. 179. 4 Mod. 186.

So in an information for using unlawful games for 7 months, contrary to stat. 33 H. 8. c. 9. 2 Roll. 522.

So where the stat. 27 H. 8. c. 16. requires enrolment of a deed *within* 6 months, it shall be intended of *lunar* months. 2 Cro. 167.

In a contract to deliver stock, the computation must be by *lunar* months. Str. 446.

But

But if money is lent for 9 months, it must be understood calendar months. *Ibid.* 632.

In all legal proceedings (as time to plead, &c.), a month is 4 weeks. 3 Burr. 1455.

But where a statute speaks of a year, it shall be computed by the whole 12 months. 2 Cro. 167.

So where a statute speaks of 6 months, in a matter which concerns ecclesiastical proceedings, it shall be computed by calendar months, as for proof of a suggestion in prohibition. 2 Rol. 521. Hob. 179. Lit. 19.

So in a *quare impedit*, the computation shall be by calendar months. 6 Co. 61. Yelv. 100. 2 Cro. 141. 167.

If a thing be limited to be done within such a time after such a fact, the day of the fact shall be taken inclusive; as where the stat. 27 Eliz. c. 18. requires an action against the hundred within a year after the robbery, the day of the robbery shall be included within the year. Hob. 139. 2 Rol. 520. l. 47.

Of the term.

The term regularly is esteemed as one day; therefore if judgment be given in full term, it relates to the first day of the term. 1 Bulstr. 35. And the first day is the *essoign* day; for the *quarto die post* is a day of grace. *Ibid.* A judgment relates to the first day, tho' a day be assigned for argument at a day subsequent. *Ibid.* 69.

Quarto die post.

The *quarto die post* is the full term, and the day for appearance of the parties. *Ibid.* 35.

If money is paid between the first day of term, and the day on which a *latitat* is sued out, the plaintiff shall enter a special memorandum, and it shall be as of the day of the return of the writ, Rep. Temp. Hard. 141. Vide 1 Term Rep. 116. 2 Lev. 176. as to entitling declaration.

May shew the true commencement of action.

The plaintiff may shew the true commencement of an action, contrary to the fiction of law, even in penal actions, 3 Burr. 1241.; and if there is no special memorandum, he may shew by the writ, that the action was commenced after the time to which the bill relates. *Ibid.*

A twelve-

A twelve-month in a lease is good for the whole ^{12 months in a} year, 6 *Rep.* 61.; but a lease for 12 months, is ^{lease.} only for 48 weeks. *Ibid.*

In the space of a day, all the 24 hours are usu- ^{In space of a} ally reckoned; the law generally rejecting all frac- ^{day, all 24} tions of a day, in order to avoid disputes. *Co. Lit.* ^{hours are reck-} ^{oned.} 135. Therefore, if I am bound to pay money on any certain day, I discharge the obligation, if I pay it before 12 o'clock at night; after which, the following day commences. *Ibid. Vide 4 Term Rep.* 121. *Leftly v. Mills.*

The law takes notice of the commencement ^{Calendar,} and course of the year, and all times which depend upon the calendar; so the judges may take notice of the calendar. *Cro. Eliz.* 227. 1 *Leon.* 328. 6 *Mod.* 196.

By stat. 24 *Geo.* 2. c. 23. the calendar is cor- ^{Alteration of} rected, and a new stile established. The year ^{stile.} 1752 to begin 1 *Jan.* 1752, and the day after the 2d of *Sept.* 1752, to be accounted the 14th *September.*

OF ACTIONS.

Personal actions. *PERSONAL actions* are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and likewise, whereby a man claims a satisfaction in damages, for some injury done to his person or property. The former are said to be founded on *contracts*, the latter upon *torts* or *wrongs*. Of the former nature are all actions upon debt, or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions. *Real actions*, which concern real property only, are such whereby the plaintiff claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. By these actions, formerly all disputes concerning *real estates* were decided; but they are now generally laid aside, on account of the great nicety required in their management, and the inconvenient length of their process, a much more expeditious method of trying titles, being since introduced, by other actions, *personal* and *mixed*.

Mixed actions. *Mixed actions* are suits partaking of the nature of the other two, wherein some real property is demanded, also personal damages for the wrong sustained.

Under these *three heads* may every species of remedy, by suit or actions in the courts of common law, be comprised.

Mutual commerce and *intercourse* is of the very essence of society; but if there were no method of compelling the faithless to keep their engagements, self-interest is so prevalent, that very few would be adhered to, and consequently very few made. Thus the chief advantage of society would entirely fail, unless its laws were so framed as to bind

bind its members to a strict performance of their contracts, by compelling them to make an adequate satisfaction for the breach of them. Hence spring the actions of *account*, *assumpsit*, *covenant*, and *debt*.

Account.

Account is a writ or action brought against a man, who, by means of his office, or for some business he hath undertaken, or some money he hath received for another, is liable to render an account to him, and refuses to do it; by this means he may be compelled to do it, and he that calls him to an account shall recover of him, not only what shall be found due, but damages also for the wrong done to him.

There must be a *privity* between the parties, and the defendant must not be a person who hath any claim in the thing to be accounted for.

The process in account formerly was by summons, attachment, and distress infinite. 2 *Inst.* 380. And by the stat. 52 *H. 3. c. 23.* the writ of account was given to the lord, which of the words of the writ is called a *monstravit de compoto*, and extends not only to bailiffs, but to guardians in socage, receivers, and other accountants. By this act it is provided, *That if bailiffs, who ought to account with their lords, withdraw themselves, and have no lands, &c. by which they may be distrained, they shall be attached by their bodies, so as the sheriff may cause them to come to render an account.* 12 *Ed. 1.* But the statute of *W. 2. c. 11.* extends only to bailiffs and receivers, and not to a guardian in socage, and gives process of outlawry. 2 *Inst.* 144. 380.

By the common law, it lay against one as guardian in socage, bailiff, or receiver, or by one in favor of trade and commerce; against another; wherein both were named merchants; and, by
stat.

stat. 13 Ed. 1. c. 23., executors shall have a writ *de compois*, with the same process as the deceased. 2 Inst. 404.

By Westm. 2. 13 Ed. 1. c. 11. stat. 1. concerning servants, bailiffs, chamberlains, and all receivers; which are accountable.

Receivers were anciently called chamberlains, 2 Inst. 380.

If the court assign auditors, there lies no writ of *ex parte talis*; for, in that case, he ought to shew his grief to the justices, and they ought to do him justice. 2 Inst. 381.

A guardian in *locage* is not within this act, for he is in *loco parentis*. 2 Inst. 380.

Process of out-lawry is given in account, so as after the account determined, the body of the defendant may be arrested. 2 Inst. 380, 381.

When the masters of such servants do assign them auditors to take their accounts, and they be found in arrearages upon the account, all things being allowed which ought to be allowed, their bodies shall be arrested, and, by the testimony of the auditors of the same account, they shall be sent unto the next goal (i) of the king in those parts, and shall be received of the sheriff or gaoler, and imprisoned in iron under safe custody, and shall remain in the same prison at their own cost, till they have satisfied their master fully of the arrearages. Nevertheless, if any person so committed, complain that the auditors have grieved him unjustly, charging him with more than he received, or not allowing him expences or reasonable disbursements, and find friends that will take him to mainprize, to bring him before the barons of the exchequer, he shall be delivered: And the sheriff shall give knowledge to his master, that he be before the barons at a certain day, with the rolls and tallies by which he made his account; and in the presence of the barons, or such auditors as they shall assign, the account shall be rehearsed; and justice done to the parties, so that if he be found in arrearages, he shall be committed to the fleet prison. Upon this clause was framed the writ called *ex parte talis*, for the person imprisoned to bring the enquiry before the exchequer.—Thus far of a particular method of proceeding with accountants. It was further ordained generally in like cases of account, that if the accountant fled,

(i) This is *quasi*, a commission to such persons to audit, &c. so that one only cannot be assigned. 2 Inst. 380. By this act the auditors are judges of the record. *Ibid.* The master may be found in arrear, but he cannot be imprisoned by the auditors. 2 Inst. 280.

and would not come to account, he was to be distrained, if he had any thing whereof distress could be made, *ad veniendum coram justiciariis ad compotum suum reddendum*; and if upon appearing he was found in arrear, and could not pay, he was to be committed to gaol: if he fled, and it was certified by the sheriff, that he was *non inventus*, he was to be demanded from county to county, till he was outlawed. It was moreover declared, that persons imprisoned for such matter, should not be repleviable; and the sheriff was enjoined not to permit them to go at large, either upon a writ of *replegiari* or otherwise, without the assent of the lord, on pain of answering to him for the damages he had sustained by such servants, according to the amount he could make out *per patriam*, to be recovered in an action of debt. If the gaoler could not make amends himself, his principal was to be liable. 2 *Inst.* 380.

The writ of account, as it had been aided with a more effectual process by the statutes before-mentioned, was rendered a very useful remedy against persons who acted *as agents*, and so became, either by *bailment or receipt*, possessed of the goods or money arising from the goods of another. The object of this writ was to bring the party *to account*, and for that purpose auditors were to be assigned. The persons who were the objects of this remedy, as they had violated a trust of great confidence, and often of great magnitude, were subject to a shorter process than any others who had broken a mere civil engagement. They alone, of all other defendants, in suits purely civil, were liable to a process against their person; but the legislature had proceeded with tenderness in allowing this process. The statutes gave it only against the persons comprised therein, in case there were no lands. We find the writ of *monstravit de compoto* made use of in *Ed. 2.* promiscuously with the common *capias* (for so the writs of *habeas corpus*, and other writs against the person, were now termed,

Writ of account, aided by statutes, rendered a useful remedy.

termed, from the word *capias* (k) being introduced in the place of *habeas*, in the command to take the body); and it was a good objection in either case to say, that the party had land, and therefore ought not to be taken; tho', if he had not lands where the receipt was alledged to be, the writ would still lie. *Mayn.* 99. 186. After these statutes, it was usual, in order to have the benefit of them, to charge defendants, either as *bailiffs* or *receivers*. It was sometimes objected, that the *monstrans* would not lie against a receiver, because the statute of *Marlbridge* speaks only of *bailiffs*: but it was said, that the writ would be good, at least by *Westm.* 2. which spoke of *receivers*; for this latter statute was to be considered as having relation to the statute of *Marlbridge*, and therefore, that the two statutes should be construed together as one; so that these writs, which had become very common, were determined to be good, under either statute. *Ibid.* 41. 94. An action of account on the stat. of *Marlb.* c. 17. against a guardian in socage, is to be found in *Mayn. Rep.* 487; which statute enacted, "*That when land, holden in socage, was in custody of the heir's relations during his minority, when he came of age, they should answer the issues by a lawful account.*"

Statute which gave the action of account.

The 25 *Ed.* 3. ft. 5. c. 5. gave the action of account to executor of executors, and 31 *Ed.* 3. c. 11. to administrators. And, by the statute of 4 *Ann.* c. 16. s. 27., actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-separate in common, his executors and administrators, against the other as bailiff, for receiving more than his share, and against their executors and administrators. And the auditors appointed by the court, shall administer an oath, and examine the parties, and for their pains have such allowance as the court shall judge reasonable; to be

(k) *Mayn.* 94. 665.

paid by the party on whose side the balance shall be.

It is said by Mr. J. *Blackstone*, that it is found Mr. Justice Blackstone's opinion as to this action, by experience, that the most ready way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce; and Mr. Justice *Buller* says, this action of late years is but rarely used. Lord C. J. *Wilmot* says, I am glad to see this action is revived. *3 Will.* 117. 1770. This was an action for a considerable quantity of coral beads, which defendant refused to account for. And I heard Lord *Kenyon* say, in a cause before him, wherein a very long and intricate account was to be gone thro' (after the party refused a reference), *Why did you not bring an action of account?* we cannot go thro' this at *nisi prius*.

The refusing of this action is laid down to be on account of the great delay in process, which was by summons, attachment, and distress infinite, *2 Inst.* 380. But as it now may be brought by bill of *Middlesex*, *latitat*, or *capias*, in the first instance, I can see no reason why it should not come into use again, especially where the matter is clear, and not very intricate.

It seems in this action the defendant cannot pay Cannot pay money into court. money into court, as he may in assumpsit. *Bull.* 126. *per Willes, C. J. T. 27 Geo. 2.*

To maintain this action there must be these What will be necessary to maintain the action. three following circumstances incident to the case: *First*, The party to be sued must have no claim in the thing demanded to his own use; for if he has, it does not lie, *Owen* 36. *3 Lev.* 24. *Secondly*, There must be a privity between the parties, either by their consent, or a privity created by operation of law, as in case of a guardian; as where goods are delivered to a stranger to my use, or to be given over to me, there, there is no agreement between the parties, and, for want of privity between me and the party who hath the goods, I cannot have

this action. *Owen* 36. *Hutt.* 36. But in the case of the crown, by reason of the prerogative, the law will supply a privy. 4 *Leon.* 21. *Thirdly*, Where the person that delivereth the goods or money, hath taken no security for the same; for where the party hath taken security, the other person, who hath taken the goods or money, cannot be said to be possessed of such things, or that he hath received them, to render an account of the profits: tho' if a bailiff doth receive money, and promises to pay it, the party who lets him have the money, may have this action or *assumpsit*; so that what is meant by a security, is not here meant of a bare right to another action, but such a security as the party may sue upon the security itself; for, in some cases, debt and account, will lie for the same thing. *Fourthly*, Where the party that hath the thing that is demanded, hath not only a bare oversight thereof, as a shepherd of sheep, or the like, but hath so far a property, as to be able to change the same for the benefit of the bailor (which is the person whose money or goods they were), or, at least, to make advantage thereof, in order to render an account for the same. 11 *Co.* 93. *Dyer*, 114. *Bro. Account* 29. 81.

The plaintiff
must charge de-
fendant properly.

The plaintiff must take care to charge the defendant in a proper manner, as the case is; as *bailiff*, *receiver*, or *guardian*. If he be *bailiff*, he must charge him so; if *receiver*, he must name him such; and if *both*, the writ must charge him so. Where the things of which a man doth receive the profits (whether it be land or goods) be uncertain, as a manor, hundred, or the like, that may be improved, there he shall be charged as *bailiff*; but where the things (be it profits of courts, forfeitures, issues, fines, amerciaments) be certain, there he shall be charged as *receiver*. 2 *Bulstr.* 277.

By bailiff.

By *bailiff*, we understand a servant that hath had the administration or charge of lands, goods, or chattels, to make the best benefit thereof for the owner; and by this writ, one may charge any one

one as *receiver*, that hath received money, or other things for me, or to my use. *Co. Lit.* 271. 2 *Leon.*

245. If one charges me as bailiff of his goods *ad merchandizandum*, in this case, I must answer for the increase, and still be punished for my negligence; but if he charge me as receiver *ad computandum*, I shall not be answerable but for the bare money or thing which was delivered. *Godb.* 55.

Co. Lit. 172. 1 *Cro.* 82. And a bailiff shall have Bailiff shall have allowances. allowances upon his account, for what he disburses belonging to his office, as to pay his quitrent, &c. *Co. Lit.* 172.; or if he be robbed, or suffer loss by other means, without any default in him. *Plow.* 14. And a guardian in socage may be Guardian in socage. charged as bailiff. 2 *Cro.* 219.

A receiver is one who receiveth the money, and Receiver. is to render an account of it, but is not allowed any charges or expences, but what is agreed on between the parties; and in this case, the plaintiff is to declare by whose hands he received it. *Co. Lit.* 172. a.

In this action there are two judgments: the Two judgments. first, that the defendant shall account, which is interlocutory; and thereupon, on motion, the court appoint auditors to hear and examine the accounts of the parties, what the defendant hath received, and what he hath expended; and the defendant shall appear from day to day, before the auditors at every day and place assigned by them, until the account shall be determined; and if either party thinks they do injustice, they may apply to the court for relief. 1 *Mod.* 42. *Williams v. Lee.* And if the auditors cannot complete the account, by the day appointed, they must apply to the court to have their time enlarged. *Raft.* 14.

If the defendant refuses to come to account, Refusal to account. application may be made to the court for a writ of *capias ad computandum*; and being taken, he must put in bail to answer the condemnation. *Towers v. Lewis.* *Keb.* 255. The auditors certify the delay or neglect of his attendance. 1 *Mod.* 42. *pl.* 94. 1 *Brownl.* 25.

If taken by *capias*.

If the defendant be taken by a *capias ad computandum*, and set to mainprize, pending the account before the auditors, and doth not keep his day before them, a *capias ad computandum de novo* shall issue forth against him. 1 Leon. 87. Cro. Car. 109.

Before the auditors the plaintiff or defendant may join issue, or demur upon the plea pleaded before the auditors. And if either of the parties shall make default, and shall not appear, then, if after appearance, the defendant shall not plead, or if he shall join issue, or join in demurrer, the auditors shall certify that to the court, and the court shall proceed to trial of the issue, if issue be joined, or by arguing the demurrer, as the case shall require; and if the plaintiff shall make default, or shall not prosecute, or if the defendant shall not answer, the court may commit him to prison; and if verdict pass for the plaintiff, costs and damages shall be recovered, and the plaintiff shall recover his goods or monies demanded, with his costs and damages, and *fieri facias*, *elegit*, or *capias ad satisfaciendum*, shall be awarded. And if a *non est inventus* be returned, then an outlawry after judgment (if suit be by original), or an action of debt. 1 Brewst. 24, 25. 2 Cro. 234. 11 Co. Mitalfe's Case.

No writ of error can be had till the second judgment given. Palm. 2. 11 Co. 40. The defendant as receiver, cannot wage his law. 1 Cro. Goodrick's case, 919.

Declaration.

The substance of the declaration against a receiver is, that the defendant be properly charged. As to the time, it is not necessary to be particular, nor as to the *quantum of the money*; but it is necessary, that the plaintiff set forth by whose hands the defendant received it. 3 Keb. 425. An executor must declare of monies received by the hands of the testator. 43 Ed. 3. 33.

Within what time to be brought.

The action is to be brought within six years, unless the account be between merchant and merchant. Stat. 21 Jac. 1. c. 16.

Declaration in account against defendant, as surviving bailiff of plaintiff.

London, to wit. John Saunders, late of, &c. esquire, was summoned to answer Thomas Godfrey esquire, of a plea, that he render to the said Thomas,

Thomas, a reasonable account of the time in which he and one *Solomon Solomons* now deceased, and whom the said *John Saunders* hath survived, were the bailiffs of the said *Thomas Godfrey*; and thereupon the said *Thomas* by *R. S.* his attorney, complains, That whereas the said *John* and the said *Solomon* now deceased, and whom the said *John* hath survived, were for a long time, to wit, from the first day of *June*, in the year of our Lord 1764, until the first day of *May*, in the year of our Lord 1765, the bailiffs of the said *Thomas*, to wit, at *London* aforesaid, in the parish of *Saint Mary-le-Bow* in the ward of *Cheap*; and during that time, had the care and administration of diverse goods, wares, and merchandizes, of the said *Thomas*; (that is to say), twelve chests of coral beads, containing a large quantity; (to wit) three thousand pounds weight of coral beads of the said *Thomas* of great value, to wit, of the value of 10,000*l.* of lawful money of *Great Britain*, to be merchandized, and made profit of, for the said *Thomas*, and to render a reasonable account of the same to the said *Thomas*, when they the said *John* and *Solomon* should be thereto afterwards requested. Yet the said *John* and *Solomon*, in the life-time of the said *Solomon*, or the said *John* since the decease of the said *Solomon*, (although often requested, &c.) have not, nor hath either of them, rendered a reasonable account of the same to the said *Thomas*; but the said *John* and the said *Solomon* in the life-time of the said *Solomon*, and the said *John* since the death of the said *Solomon* have altogether refused, and the said *John* doth refuse so to do, to the said *Thomas* his damage of 15,000*l.*; and therefore he brings his suit, &c.

Account against a bailiff, it is said, shall be brought in the county where he was bailiff, but against a receiver, it may be in any county. *F. N. B. 117. (C) 30 E. 3. 20.*

Breach.

Suffolk, to wit. *George Bond* complains of *William Edge*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, of a plea, that he render to the said *George* a reasonable account for the time that he was bailiff to the said *William* at *A.* in the said county; and there receiver of the money of the said

Against a bailiff and receiver, of 100*l.* &c.

said *William*, For that whereas, the said *George*, on the first day of *October*, in the year of our Lord 1760, until the first day of *May*, in the year of our Lord 1761, at *A.* aforesaid in the said county, had been *bailliff* of the said *George*, of the manors of *H.*, *I.*, and *K.* and 20 messuages, and 500 acres of land with the appurtenances, and during all that time had the care and management of the horses, cows, and sheep; to wit, 50 horses, 50 cows, and 500 sheep, to make merchandize and profit thereof for the said *George*, and to render the said *George* a reasonable account of the same; and during the time aforesaid, that the said *William* had been *bailliff* to the said *George* at *A.* aforesaid, in the county aforesaid, he the said *William* at *A.* aforesaid, in the county aforesaid, received of the money of the said *George* 10,000*l.* by the hands of *Richard Sykes*, to make merchandize and profit thereof, for and to render a reasonable account thereof to him the said *George*, when he the said *William* should be thereto afterwards requested; yet the said *William* (altho' often requested, &c.) hath not yet rendered a reasonable account thereof to the said *George*, but hath altogether refused, and still doth refuse so to do, to the said *George* his damage of 20,000*l.*; and therefore he brings his suit, &c. pledges, &c.

It is said in 3 *Wils.* 104. That the defendant in account, need not plead at all in the action, but may come into court, and say to the judges here; "*I am willing to account with the plaintiff, and pray that auditors may be assigned,*" to take an account between me and the plaintiff.

With respect to the plea, the following rules may be useful:

Rules as to the plea in account.

1. That whatever matter can be pleaded in bar to the action, must be so pleaded; and that whatever matter which may be pleaded in bar, cannot afterwards be pleaded before the auditors; the reason is, to avoid trouble and charge to the parties. *Sry.* 411.

2. Except

2. Except in case of a release, or *plena computavit*, Release and *plena computavit*, extinctions of the right of action. if the party is once chargeable and accountable, he cannot plead in bar, but must plead before auditors; these exceptions are, because a release, and having fully accounted, are total extinctions of the right of action; which the court is to judge of, and even in those cases, they must be pleaded specially, and cannot be given in evidence on *non minus receptor*. *Brownl. 24, 25.*

3. Nothing can be pleaded before auditors, contrary to what has been pleaded before, and which has been found by verdict; because it would introduce either contrary verdicts, or two verdicts of the same, which is absurd. All the cases where the pleas have been rejected before auditors, were, because they might have been pleaded in bar; the defendant shall not *lie by* and plead before auditors, what he might have before pleaded in bar. *Le C. J. Wilmet. Godfrey v. Saunders. 3 Wils. 114.*

Motion to set aside *fi. fa.* executed, and money to be restored in action of account—plea fully accounted, and issue thereon; the jury found for the plaintiff, and assessed damages and costs; judgment was entered up, and execution awarded. It was contended that the judgment ought to have been only *quod computet*, and then the parties should have entered into the account before auditors assigned, and that the final judgment should not have been signed till then. *Per Cur.* The judgment is wrong, for it ought to have been only *quod computet*; and we will take this to be an irregular judgment, and like a final judgment signed before any interlocutory judgment; therefore let the judgment and execution be set aside, and the money restored. *Hughes v. Burgess. Rep. temp. Hard. 394.*

Kent, to wit. *John Denn* complains of *Richard Fenn*, being, &c. in a plea, that he render to him a reasonable account, for the time that he was bailiff of the said *John*; For that whereas, he the said *Richard* for a long time, to wit, from the first day

No plea before auditors, contrary to what has been pleaded.

Assessment of damages on a plea of *quod computet*, and judgment signed thereon, is bad, it ought to have been judgment *quod computet*.

By one joint-tenant against another, for money received for the letting a mare.

day of *June*, in the year of our Lord 1753, until the 13th day of *June*, in the year of our Lord 1754, at *Maidstone*, in the county aforesaid, was proprietor of one undivided moiety, and bailiff of the said *John* of the other undivided moiety of a certain mare, and during that time, had the care and management of the said mare, and the letting out to hire of the said mare, for the advantage and profit of the said *John* and *Richard*, to render a reasonable account thereof to the said *John*, when he should be thereto afterwards requested; Yet the said *Richard* (altho' often requested, &c.) hath not as yet rendered the said reasonable account to the said *John*, but he so to do, hath hitherto wholly refused, and still refuses, to the said *John* his damage of 60*l.*; and therefore he brings his suit, &c. Pledges, &c. *Com. Dig.* 1. v. 96. b. This action is given by stat. 4 and 5 *Ann.* c. 16. s. 27.

He who is awarded to account, swears, that he will account well and lawfully. *Br. Account*, pl. 10. cites 41 *E.* 3. 3. 9.

Assumpsit.

Assumpsit.

1. *The Origin of the Action of Assumpsit.*

In the reign of *H. 4.* we find actions on the case had grown very common, as *for disturbing a way; for negligently keeping a fire, and burning the plaintiff's house; for selling bad wine; for not repairing banks; for keeping a school near an antient one;* vide the year-book of *H. 4.* The term of trespass *sur le case*, was in familiar use: before, they were more usually called actions of trespass simply; but the marks of discrimination between trespass, and trespass upon the case, began now to be distinctly ascertained. It was held that the former must always be *vi et armis*, the latter *never*. The nature however of injuries is often so complex, and their consequences so various, that the truth of a matter sounding in case could not be properly set forth, without sometimes alledging circumstances which carried evident force in them: therefore in 12 *H. 4.* where an action on the case was brought for stopping a sewer, so as several acres of ground were flooded, it was held good, that the stopping the sewer was laid *vi et armis*, that being a *mal-feasance* and the remote cause of the injury sustained by the plaintiff; tho' the *consequential damage*, which was the *immediate cause*, and the gist of the action, was *in case*. 12 *H. 4.* 3. a distinction which was many years adopted as a just one. It was then laid down, that the *causa causans* (as they called it) might be forcible, as in this instance of stopping the sewer, and be laid *vi et armis*, even in an action on the case, though that action is properly grounded upon *the consequence of such stoppage*: this consequence they distinguished by the appellation of *causa causata*. This action was so near a-kin to the action of trespass, that it required no small degree of sagacity to per-
ceive

ceive the instances in which the old form failed, and it was necessary to make a special writ. The action on the case was found so convenient a remedy; that it was wished to extend it still further. They wanted to apply it to cases of *non-performance of promises*: but these did not so kindly fall within the analogy of former instances. It was harsh to give the name of *trespass* to a thing which was never done; it took therefore some time, and needed the concurrent force of some strong motives, to induce the courts to admit these new writs. The present state of the remedies in use, where contracts were not performed, operated very probably towards gaining a support for these new actions upon the case. If a man performed not his covenant, an action of covenant lay; but it had been long held, that an action of covenant must be grounded on a *specialty*; so that where the parties had not so bound themselves, that remedy failed. If a man did not pay money which he owed, the remedy was by action of debt; in which the defendant might discharge himself by *wager of law*, unless the demand was founded upon a *specialty*: the same in *detinue*. To obviate these and the like defects, and to legitimate an action of a more effectual nature in matters of contract, was worth the attempt. Several actions were brought before they were allowed and authenticated. The first was against a carpenter; *quare cum, &c., assumpsit, &c.*; to build a house within a certain time; he had not done it. It was objected, that this was in *covenant*; and as no writing was shewn, the action must fail. And it was pronounced, that this remedy was inadequate where the contract was *executory*, and where the only complaint against the defendant would be for his *non-fulfilment* or *non-performance*. 2 H. 4. 3. 6; another, 11 H. 4. 33. vide *Bro. Ab. sur Case*, 40.

These determinations left all persons who had made agreements without deed, (for, if a mere writing, it could not be declared on in covenant,) and where nothing had been done to execute the contract,

Wager of law.
Co. 2 Inst. 45.
2 Inst. 295.

contract, entirely without redress; and the determinations might have driven the parties into chancery, where they could have these agreements decreed to be specifically performed. This perhaps, as well as other considerations, might incline the courts to review this grand point, and try if they could accommodate the notions of law, as then understood, to the exigencies of the occasion; and thereby not only draw back into its proper channel the current of decision from the chancery to the courts of common law, but, by rendering this action more general, put the nation in possession of what was then much wanted, a more effectual common-law redress in matters of contract. In the 3d of H. 6. the distinction that had been made between a *non-performance* and a *negligence* or *mal-feasance* was denied (1). An action on the case

(1) *Mal-feasance*, is when a man does something purposely on his own head, fancy, or humour, without any express agreement, implication; or requiring of law, by which ill-doing the plaintiff receives damages; as arresting a man without cause, disturbing the plaintiff in his office, rescuing a prisoner out of custody of officers, enticing away an apprentice, &c.

Non-feasance, non-faisance, or faisance, is when a man does not do or perform something which he ought to do, either by his own express undertaking, or by the implication or requiring of law, (called an assumpsit implied,) by the not doing whereof, the plaintiff receives damage.

Misfeasance or feasance, is the doing of something (which a man hath expressly undertaken to do, or which the law by implication requireth him to do) otherwise than he undertook, or the law requires it should be done; by the mis-doing whereof, the plaintiff receives damage; as against a surgeon for neglecting the cure of a leg, &c.

Non-feasance upon an express or implied promise or duty, has reference to a man's *real estate*, as the not making a feoffment according to a bargain, but selling it to another; not delivering seisin of land sold, but selling it to another:

Or to his personal estate, as the not paying money at several times upon a bargain of cattle, according to express promise, or for goods sold on request, or upon a promise to pay for goods at a certain day:

Or to his person, as not saving plaintiff harmless, or for not arresting defendant upon a writ being, in the sheriff's presence, or for not proceeding according to instructions:

These are generally placed in the entries under the title of *Torts*, i. e. wrongs or injuries, and intermixed one with another.

Many precedents under title *Non-feasance* have a near relation to *misfeasance* and *negligence*.

Established now
that action
would lie for
non-feasance.

It was declared by the whole court, 21 H. 7. p. 30. that an action upon the case would lie as well for a *non feasance*, as for a *mal feasance*; and again recognized, 21 H. 7. 41., at which time it was said, that if a man bargained that another should have his land in fee for such a sum of money, and neglected to make an estate accordingly, an action upon the case would lie without any need of

Advantage of the
action.

suing out a *subpœna* in chancery. The prodigious advantage of this common-law remedy, to substantiate promises and undertakings, was soon discerned by the legislature; which on this account, as well as on account of the many applications that were made of this action in this reign, passed an act (a), which gave to the *action upon the case*, the same process as was before in an *action of debt*.

(a) 19 H. 7.
c. 9.

Of the Action of Assumpsit.

An assumpsit,
what.

An *assumpsit* is an action the law gives a party injured, by the breach or non-performance of a contract legally entered into; it is founded on a contract, either *express* or *implied* by law, and gives the party damages in proportion to the loss he has sustained, by the violation of the contract. 4 Co. 92.

Express con-
tracts.

Express contracts, are where the terms of the agreement are openly uttered and avowed at the time of the making; as to deliver an ox or 10 load of timber, or to pay a stated price for certain goods. An express promise will give an action, which otherwise the plaintiff must have had recourse to some other action. 1 Salk. 9. *Wilkin v. Wilkin*. An express contract, takes away the contract implied by law. *Allen*, 94.

Implied.

Implied, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: As if I employ a person to do any business for me, or perform any work;

work; the law implies that I undertook, or contracted, to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement or price, the law concludes that I contracted to pay their real value. And there is also one species of *implied contracts*, which runs thro' and is annexed to all other contracts, conditions, and covenants, viz. *that if I fail in my part of the agreement, I shall pay the other party such damages, as he has sustained, by such my neglect or refusal.*

On an implied promise, you may declare by way of a general in debitorum assumpsit. *Salk.* 22.

A contract may also be either *executed*, as if A. agrees to change houses with B., and they do it immediately; in which case the *possession*, and the *right* are transferred together; or it may be *executory*, as if they agree to change *next week*; here the right only vests, and their reciprocal property in each other's house is not in possession, but in action; for a contract *executed* conveys a *chose in possession*; a contract *executory*, conveys only a *chose in action*.

Of contracts executed; or executory.

A consideration of some sort or other, is so absolutely necessary, to the forming of a contract, that a *nudum pactum* or agreement to do, or pay any thing on one side, without any compensation on the other, is *totally void in law*: and a man cannot be compelled to perform it, *Doct. and Stud. c. 24.* As if one man promises to give another 100l.; here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for; and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio.* *Salk. 129. Bro. Ab. 79.* But any degree of reciprocity will prevent the pact from being *nude*: nay, even if the thing be founded on a prior or moral obligation, (as a promise to pay a just debt, tho' barred by the statute of limitations) it is no longer *nudum pactum*. And as this

Of consideration to the contract. What is a nudum pactum.

Why the rule was established. rule was principally established to avoid the inconvenience that would arise from setting up *mere verbal promises*, for which no good reason could be assigned, *Plow.* 308.; it therefore does not hold in some cases, where such promises are authentically

Voluntary bond. proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade the payment; for every bond, from the solemnity of the instrument, *Hardres* 200. 1 *Ch. Rep.* 157., and every note, from the subscription of the drawer, carries with it an internal evidence, of a good consideration. *Lord Ray.* 760. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract. *Vide Noy's Max.* c. 42.

Express contracts, what they include.

Express contracts include three distinct species; *debts, covenants, and promises.* The legal acceptance of *debt* is, a sum of money due by certain and express agreement; as by a bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and unalterable, and does not depend upon any after calculation to settle it. The non-payment of these is an injury, for which an action of debt lies. *F. N. B.* 119.

Covenant.

A *covenant* also, contained in a deed to do a direct act, or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at *Canterbury* by such a day, or not to exercise a trade in a particular place, and is not at *Canterbury* at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be, perhaps, greatly to the disadvantage and loss of the covenantee. The remedy for this, is an action of covenant.

Promise to do an explicit act, is an express contract.

A *promise* is in nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore

fore it be to *do any explicit act*, it is an *express contract*, as much as any covenant; and the breach of it is an equal injury, and an action lies on the case, for what is called the *assumpsit*, or undertaking of the defendant.

Some *agreements* indeed, though never so *expressly* made, are deemed of so important a nature, that they ought not to rest in *verbal promise only*, which cannot be proved, but by the memory of witnesses. To prevent which, the stat. 29 Car. 2. c. 3. enacts, that in the *six* following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party charged therewith: 1. *Where an executor or administrator promises to answer damages out of his own estate.* 2. *Where a man undertakes to answer for the debt, default, or miscarriage of another.* 3. *Where any agreement is made upon consideration of marriage.* 4. *Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein.* 5. *Where there is any agreement that is not to be performed within a year from the making thereof; and* 6. *That no contract for the sale of goods, wares, and merchandise, for the price of 10l. sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged, or their agents, thereunto lawfully authorized.* The statute of frauds and perjuries,
and no contract for the sale of goods above 10l.

Upon these clauses, the following decisions have been taken place: As to the 1st, I find no determination; to the 2d, the rule is, that if the defendant comes *only in aid of the other*, who obtains the goods, so that there is a remedy *against both*, according to their engagements, that that is a *collateral undertaking*, and void without a note in writing; but where the *whole credit is given to the defendant*, so that the *other is but as his servant*, and there is no remedy *against*

against him, that that is not a collateral, but an original undertaking; in which case, a note in writing is not necessary. *Bourkermire v. Darnell*. 1 Salk. 27. Bull. N. P. 276.

A broker about to sell goods to an insolvent, promises landlord to pay him his rent, if he will not distrain; this promise need not be in writing.

As where one Taylor, a tenant to the plaintiff, being three quarters of a year in arrear for rent (45*l.*), and insolvent, conveyed all his effects for the benefit of his creditors. They employed Leper, the defendant, as a broker to sell the effects, and accordingly he advertised a sale. On the morning advertised for sale, Williams, the landlord, came to distrain the goods in the house; Leper, having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining, which he did. At the trial a verdict was found for the plaintiff 45*l.*—*Ld. M.* Leper was a trustee for all the creditors, and was obliged to pay the landlord who had the prior lien. This has nothing to do with the statute of frauds; it is rather a fraud in the defendant to detain the 45*l.* from the plaintiff, who had an original lien upon the goods.

J. Wilmot. This case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise in order to discharge the goods of this distress. I consider this distress, as being actually made. Leper says, *If you will quit the goods, and disincumber the fund, I will pay you.* Leper became the bailiff of the landlord; and when he had sold the goods, the money was the landlord's (as far as 45*l.*) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use.

N. B. The declaration does not state whether the promise was in writing or not; but *Tates J.* held,

Need not state in the declaration that the promise is in writing.

held, that it was not necessary to state *the promise to be in writing*, and said, defendant undertook to pay this 45*l.* in all events *peremptorily and absolutely*. This is an original consideration to the defendant, and concurred that the verdict should be entered for 45*l.*

Aston J. The goods were a fund between both, and on that foot I concur. The question made was, Whether the verdict should be entered for 45*l.* or for a smaller sum (7*l.* 5*s.*)? The promise not having been reduced to writing, *postea* ordered to be delivered to the plaintiff, and the verdict to stand for the whole 45*l.* *Williams v. Leper*, 3 Burr. 1886.

If two come to a shop and one buy, and the other, to gain him credit, promise the seller, "If *two* come to *either*, to gain him credit, promise the seller, "If *a* shop. *be do not pay you, I will.*" This is a collateral undertaking, and void without writing; but if he say, "Let him have the goods, I will be your paymaster." This is an undertaking for himself, and he shall be intended the very buyer, and the other to act as his servant. *Bull. N. P.* 276. Mr. Justice Buller says, However it is impossible to lay down any precise rule for the construction of such sort of words, but it must be left to the jury to determine upon the whole circumstances of the case, to whom the original credit was given. *Ibid. Salk.* 27.

The general line now taken is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt, must be in writing, otherwise it is void. *Per Buller J. Matson v. Wharam. 2 Term Rep.* 81.

Juack, plaintiff's testator, brought an action for assault and battery against one *Johnson*. The cause being at issue, record entered, and coming on to be tried, the defendant *Nash* being present in court, in consideration that *Juack* would not proceed to trial, but would withdraw his record, promised to pay him 50*l.* and costs. *Juack* withdrew his record, and no further proceeding was had. *Juack* being dead, *Read*, his executor, brought this action on

A promise to pay damages by a third person, in case the plaintiff will withdraw his record, is not within the statute of frauds.

this special promise by *Nash*, who pleaded non-assumpsit, and the statute of frauds, and the plaintiff demurred. *Lee C. J.* The single question is, Whether this promise, which is confessed by the demurrer not to be in writing, is within the statute of frauds and perjuries, that is to say, whether it be a promise for the debt or miscarriage of another person? And we are all of opinion it is not, but that it is an *original promise*, sufficient to found an assumpsit upon against *Nash*, and is a lien upon *Nash*, and upon him only. *Johnson* was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there might have been a verdict for him if the cause had been tried, for any thing we can tell; he never was liable to the particular debt, damages, or costs. The true difference is between an *original*

Difference between an *original* and *collateral* promise.

promise, and a *collateral promise*; the *first* is out of the statute, the *latter* is not, when it is to pay the debt of another which was already contracted. *Read Ex. v. Nash. 1 Wils. 305. Ld. Ray. 1085.*

A promise within the statute.

The plaintiff declares, *that whereas one Vickars* was indebted to him in a certain sum, and he had commenced an action for the same, the defendant, in consideration that the plaintiff would stay his action against *Vickars*, promised to pay the plaintiff the money owing to him by *Vickars*, to which there was a demurrer and joinder; *Cur.* This case is very clearly within the statute; for, here is a debt of another person still subsisting, and a promise to pay it. Judgment for the defendant. *Fish v. Hutchinson, 2 Wils. 94.*

Where the 3d person is principal debtor.

If *A.* promise *C.* that, in consideration of his doing some particular act, *B.* will pay him such a sum, *A.* is the principal debtor; for the act is done on his credit, and not on *B.*'s. *Fitzg. 302. Bull. N. P. 277.*

Doubts arose by making use of the word *collateral*.

Mr. Justice *Buller* says, Many of the doubts upon this statute have arisen by making use of the word *collateral*, which is not a word used in the act of parliament. The proper consideration is, *whether*

ther it be a promise to answer for the debt of another; for if it be, though it be upon a new consideration, and therefore strictly speaking not a collateral undertaking, yet it is within the statute, and the adding to the promise of the payment of the debt, a promise to pay the costs of the action, would make no difference. *B. N. P. 277. cites Fish v. Hutchinson. T. 31 Geo. 2. C. B.*

A promise made in these words, "If you do not know her, you know me, and I will see you paid." This was held void. *2 Term Rep. 80. Maison v. Wharam.* So is this: "You must supply my mother-in-law with bread, and I will see you paid." *Jones v. Cooper, Cowp. Rep. 227.*

The third case is, *On agreements in consideration of marriage.* It is settled, that mutual promises to marry are not within the act; for the statute relates only to promises or contracts in consideration of marriage, as to pay money, make a settlement, &c. *1 Str. 34. Cock v. Baker. 2 Vent. 361. 1 P. W. 618.*

The fourth case is, *On agreements for sale of lands, or any interest in them.* A contract for sale of timber, growing upon land, is not within the statute, but may be by parol; because it is a bare chattel. *1 L. Ray. 182. Vide 1 Atk. 12. and 1 P. W. 770. Bull. 277.*

A copyhold was sold by auction, defendant the best bidder, the lot knocked down, he gave his name, which was written in the catalogue, as the purchaser; the deposit not being paid, was soon after demanded, and refused, for which a special action was brought; and *Eyre C. J.* held, that it was within the stat. of frauds, and that the plaintiff could not recover. *Stansfield v. Johnson, Hil. 34 Geo. 3. at Guildhall.*

The fifth case is, *On agreements not to be performed within a year.* The rule laid down is, where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there is no note necessary; *If agreement is to be performed upon a contingent, and does not appear to be performed after the year, note not necessary;*

but if it be to be performed after the year, a note necessary.

note in writing is *not* necessary, for the contingent *might* happen within the year; but where it *appears* by the *whole* tenor of the agreement that it is to be performed *after* the year, there a note is *necessary*; otherwise *not*. This was case upon an agreement, in which the defendant promised, for one guinea, "*to give the plaintiff so many at the day of his marriage.*" Question, If such agreement ought to be in writing, for the marriage did not happen within a year? *Peter v. Compton*, *Salk.* 280. cited in *3 Burr.* 1281. *Fenton v. Emblers.*

Agreement to leave money by will, need not be in writing, tho uncertain as to time of performance.

The defendant's testator by *parol*, promised plaintiff, that if she would come to live with him as housekeeper, that he would give her 8*l.* a year, and leave her by his will an annuity of 16*l.* a year. She went and lived with him till his death; when he having failed to make for her the provision promised, she brought her action against the executor, and it was ruled, on pleading the statute, that as this depended on a *contingency*, as testator might have died within the year, *no note in writing was required*, and plaintiff recovered the value of the annuity 2*l.* *Fenton v. Emblers*, *3 Burr.* 1278. *1 Black. Rep.* 353. *S. C.*

So to pay 100*l.* on defendant's marriage.

So where the promise was to pay 100*l.* on defendant's marriage; this need not be put in writing, for it depends on a *contingency*, which may or may not be performed within a year. *Comb.* 463. *Skin.* 326. So where it was to pay *on the return of a ship*; for both these contingencies might happen within the year. *Salk.* 280. *Bull.* 277. The clause in the statute only extends to *such* promises where, by the express appointment of the party, the thing is not to be performed within a year. *Wilmot J.*

So on return of ship.

The 6th is, *No contract for sale of goods, &c. for 10*l.* shall be allowed good, except, &c.*

Executory contracts for goods not within stat.

The defendant bespoke a chariot, and when made, refused to take it. In an action for the value, the *C. J.* ruled, this not to be a case within the statute, which relates only to contracts for the actual

actual sale of goods where the buyer is *immediately answerable*, without time given him by a special agreement, and the seller is to deliver the goods immediately. *Towers v. Sir John Osborne*, 1 Str. 506.

The defendant, 13 October 1766, agreed to deliver a load and an half of wheat to the plaintiff, *within three weeks or a month from the said agreement*, at the rate of 12 guineas a load, *to be paid on delivery*, which wheat was understood by both parties to be *at that time unthreshed*. No part of the said wheat so sold was delivered; nor any money paid by way of earnest for same, nor any memorandum made in writing. *Yates J.* The clause in the statute relates only to *executed contracts*. Here wheat was sold, to be delivered at a future time: it was *unthreshed* at the time when the contract was made, therefore it could not be delivered at that time. The case in Str. 506. is in point—*Postea* delivered to plaintiff. *Clayton v. Andrews*, 4 Burr. 2101.

The plaintiff agreed to buy sheep at *Lewes fair*, and to take them away at a certain hour. There was no money paid, nor any sheep delivered. The plaintiff not coming at the time appointed, nor sending to take the sheep, defendant sold them to another person. Plaintiff brought trover for the sheep, and obtained a verdict. *Court held*, on motion for new trial, that the statute of frauds prevented any property from vesting in the plaintiff, so as to enable him to maintain trover, there being neither earnest, delivery, nor agreement in writing. Rule absolute for a nonsuit. But where a sale is *not immediate*, it is not within the statute; such as to purchase a carriage when it shall be built, and the like. 1 H Black. Rep. 20. *Alexander v. Comber*.

Action against the defendant, who had bought goods at an auction, which were not taken away according to the conditions of sale, but put up again, and re-sold. Verdict for plaintiff—motion for new trial. The defendant was a broker, and
-bid

The like executory contract.

Where a sale is not immediate, it is not within the statute.

Auctions seem not within the stat.

bid for one *Durant*; but did not name his principal till some days after. The auctioneer, when he knocked down the lots to the highest bidder, put down his name, in the usual manner, as the purchaser of those goods. The defendant came the next day, and saw the goods weighed. Objection now made was, that this contract, *not being in writing*, was void by the statute of frauds. *But the court were clearly of opinion*, that the auctioneer must be considered as agent for the buyer (after knocking down the hammer) as well as for the seller, and that his setting down in writing the name of the buyer, the price, &c. was sufficient to take it out of the statute; and that the buyer's coming the next day, and seeing the goods weighed, was an additional circumstance that deserved attention; and discharged the rule. And they inclined to think, that buying and selling at auctions was not within statute of frauds. *Simon v. Motivos*, 3 Burr. 1921. Bull. 275. *Yates held*, that as the contract was *executory*, viz. *the lot to be fetched away in six weeks*, that therefore it was not within the statute.

Verbal agreement to buy 3000 sacks of flour.

A verbal agreement was entered into by *A.* and *B.*, that *A.* should buy 3000 sacks of flour of *B.* and others, in co-partnership with the *Albion Mill Company*, at 41s. per sack, upon condition, that *A.* was to export the flour to foreign parts; and it was agreed, that *B.* should deliver to *A.* on board of ships in the river *Thames* said flour, which defendant did not deliver on request. Verdict for plaintiff—Motion for a new trial. Lord *Loughborough*: The only point to be decided, is that

29 Car. 2. c. 3.
1. 7.

which arises on the *statute of frauds*: that statute has made it necessary, that either the party buying should accept and receive part of the goods sold, or give something in earnest to bind the bargain; or that there should be some note, or memorandum in writing, signed by the parties to the contract. This act is meant to regulate *executory*, as well as other contracts. The words are, *No contract for the sale of any*

any goods, &c. And indeed it seems the provision of the statute would not be of much use, unless it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confusion will probably arise, which the statute was designed to prevent.

Something therefore *direct* and *specific* is to be done, to shew that the agreement is *complete*, that there may be no room for doubt or hesitation. This was the intention of the statute in all contracts of *Wholey v. Bag-* sale, above a certain value, in order to prevent *na's*, 6 *Brown's* confusion and uncertainty in the transactions of *Parl. Cas.* 45. mankind. Rule to enter a non-suit. *Rondeau v. Wyatt*, 2 *H. Black. Rep.* 63.

Assumpsit is of two sorts—*Indebitatus assumpsit*, *Assumpsit, two* which in it's nature is an action of debt, and will *sorts.* lie in many cases where debt lies, and in many where it does not lie. 4 *Co.* 92. 2 *Burr.* 1005.

A *special assumpsit*, in which the damages are not in the nature of a debt, but as a compensation for injury.

An *assumpsit* lies upon every *executory* promise not performed, made upon a *good* consideration. It *Executory promise.* lies where the defendant is under an obligation from the natural ties of justice to refund: for the law implies a debt; and gives this action *quasi contractu*.

There are *three* sorts of agreements, *viz.* an agreement *executed*, an *assent* subsequent to a thing done, *Three sorts of agreement.* and an *agreement executory*. *Pl. Com.* 8. b. 9. a.

An agreement *executed*, often amounts to a bar. *Executed.* gain and sale. So when an *assent subsequent*, is given to an act precedent, by such assent, the agreement is executed. *Ibid.*

An *agreement executory* is, when the thing agreed *Executory.* is to be done *afterwards*, *ibid.* 9. As if a man agree to pay so much for such goods, at such a day. So if he agree to do such a thing upon a condition or contingency. And where an agreement is conditional, it shall not be complete, till the condition be performed. *Kitch.* 181.

The

The damages in
indeb. ass., &c.

The damages in this action are in their nature *indeterminate*: and will therefore adapt and proportion themselves to the truth of the case, which shall be proved, without being confined to the precise demand stated in the declaration. For if any debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will be proportioned to the actual debt.

Will not lie
where the debt
is due by speci-
alty.

An *indebitatus assumpsit* will not lie, where the debt is due by *specialty*, for in such case, the *specialty* ought to be declared upon; therefore it is always necessary in this action, to shew for *what cause the debt grew due*; and in case it be not shewed, it will be sufficient reason to arrest the judgment, or to reverse it upon a writ of error. *Bull. N. P. Cro. Jac.* 206. 213.

Of the Action for Money had and received.

Implied contract.

Assumpsit, being in it's nature an equitable action, it is a general description of all cases, wherein it lies; that the defendant is obliged by *ties of natural justice*, to refund money which he may have received of the plaintiff, or to pay it, if the plaintiff has a legal right to demand the same; it therefore lies to recover back money under a mistake, or thro' the deceit of the other party. As,

For what money
had and received,
will lie.

If a man recover upon a policy for a ship presumed to be lost, which afterwards comes home; *Skin.* 411; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risk deemed to be fair, which turns out afterwards to be grossly fraudulent; or if an indorsee of a promissory note, having received payment from the drawer, or maker of it, sues and recovers the same from an indorser, the party shall recover back the money so paid. *Moses v. Macfarlan,*

Assumpsit.

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farlan, 2 Burr. 1009. So for money paid as a premium on a void policy. *Martyn v. Sitwell. Show.* 136. So, if the risque is 'not run, tho' by the neglect or even the fault of the party insuring, the insurer shall not retain the premium. So it lies for part of the premium, for he shall retain only such part as he has *run the risque of.* 3 Burr. 1240. But if the risque is once commenced, the insured shall not have a return of premium, if they do not choose to proceed on the voyage, *unless the contract and voyage is of a divisible nature*; *ibid. Cow.* 668. *Dougl.* 72. 751. So it lies against a stranger who took the fees of office of a stewardship of a court-leet, and court-baron. 2 *Show.* 21. *pl.* 14. 2 *Mod.* 260. So for rent received by one who pretends title. 2 *Mod.* 263. So if money be overpaid. 11 *Mod.* 147. So if received under an order of sessions, which was afterwards reversed in *B. R. Ld. Ray.* 742. So where money was paid in pursuance of a void authority, *ibid.* So if paid on a mistake in an account, or under or by a mere deceit. 1 *Salk.* 22. 24. So against a man who married a *second wife*, and received her rents, the first wife living, 11 *Mod.* 146, tho' the tenant who paid it to him be discharged. 1 *Salk.* 28. 12 *Mod.* 324. So against a stake-holder by the winner. *Comb.* 303. 5 *Mod.* 13. 10 *Mod.* 315. *Holt's Rep.* 37. 25. *Show.* 157. So against an executor or administrator, having sufficient assets upon a *promise to pay*, to recover a legacy. *Cow.* 284. So upon a consideration which happens to fail, 2 *Term Rep.* 360. *Palm.* 364; or for money got thro' imposition (express or implied), *Dougl.* 671. 2 *Term Rep.* 763; or extortion or oppression, 2 *Str.* 915. 2 Burr. 1012; or under an undue advantage taken of the plaintiff's situation, *ibid.* contrary to the laws made for the protection of persons under those circumstances. So for money embezzled by a nurse, *Bull.* 130, or clerk, *Cowp.* 197. So for money received on an erroneous judgment, 2 Burr. 1005. 1 *Black. Rep.* 219. So if money be paid to

Assumpsit.

to a lottery-office keeper for insurance, which is made illegal by act of parliament. 2 *Black. Rep.* 1073; 1 *H. Black. Rep.* 65. So against an auctioneer for the deposit, if there be any *defect* in the thing sold; 5 *Burr.* 2639; but the deposit only is recoverable with interest, not damages, for the loss of the bargain. 2 *Black. Rep.* 1078. So where plaintiff had 10 guineas for a one-horse chaise and harness, *on condition*, that if his wife did not approve within three days paying 3s. 6d. per day for the hire, where it was sent back in the time limited, and left, and the hire tendered. 1 *Term. Rep.* 133. So where goods are taken in execution *not the property of defendant*, the plaintiff may waive the trespass, and bring this action for the money which the goods sold for. *Cow.* 419. So if goods be taken on a warrant of distress under a conviction; if the conviction be quashed, the owner may waive the tort and bring this action, *ibid.* So where an horse is warranted sound, and money paid for him; if it be *unsound*, and an *immediate return*; 1 *H. Black. R.* 19; but otherwise the action must be on the warranty, *ibid.* If a purchase be made, and the thing contracted for not delivered, this action will lie for the money advanced. 1 *Str.* 407. *Cow.* 296. So on a contract for stock, the party who has the difference in his hands, is receiver to the other's use. 1 *Str.* 406. So if money be mispaid to an agent, before he accounts to his principal, the agent is liable. *Cow.* 568. So if under an order for a dividend, and the proceedings are conclusive evidence of the debt, nor shall the assignees be allowed to plead a set-off. *Dougl.* 392. So where one pays a forged bill, note, or bond, for the authority is void. 3 *Term Rep.* 127. This action must be brought against the principal, not the collector. 4 *Burr.* 1984. So for money received by one partner, to the separate use of the other, wrongfully carried to the partnership account. It lies if A. pays money to B. on a contract for old stock, and B. delivers him additional stock. *Str.* 407. So
where

where a custom-house officer had exacted exorbitant fees from the master of a vessel, he will be liable to this action, at the suit of the owners. *Cow.* 805. *Stephenson v. Mortimer.* So for money levied by a *fi. fa.* on the goods of the bankrupt, after an act of bankruptcy committed against the plaintiff. *3 Will.* 304. So where a bankrupt was in prison, and ordered his goods to be sold, and notice given to the broker not to sell, *as there would be a commission*, he sold and paid the money to the bankrupt, and was held liable to the assignees. *2 Term Rep.* 141.

One great benefit that arises to suitors from the nature of this action is, that the plaintiff need not state the *special* circumstances, from which he concludes that, *ex æquo et bono*, the money received by the defendant, ought to be deemed as belonging to him; he may declare generally, that the money was received to his use, and make out his case at the trial. This is equally beneficial to the defendant. It is the most favorable way in which he can be sued: he can be liable to no further than the money he has received; and against that, may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short he may defend himself by every thing which shews that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it. If the plaintiff elects to proceed in this way, it is a bar to his bringing another action upon the agreement: tho' he might recover more upon the agreement, than he can by this form of action; and therefore there seems to be no reason or utility, in confining the plaintiff to an action upon the special agreement only. *Moses v. Macfarlan*, 2 Burr. 1010. The case of *Dutch v. Warren* decides this (n): Where the court said, if one man takes another's money to do a thing and refuses to do it, it is a fraud: And it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to disaffirm the agreement *ab initio*,
The benefit of the action.
The defence.
(n) Rep. in 1 Stra. 406.

initio, by reason of the fraud, and bring an action for money had and received to his use. This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. 2 Burr. 1012. *Moses v. Macfarlan*.

Retainer on
non-assumpsit.

The defendant, a ship-broker, was plaintiff's agent in suing for, and recovering a sum of money for damages done to plaintiff's ship; he recovered 2000*l.* for plaintiff's use, and paid him all but 40*l.*, which he retained for his labor and service therein. In an action for money had and received, the court held on *non-assumpsit*, that this is not in the nature of a cross demand or mutual debt; it is a charge which makes the money received for plaintiff's use, so much less. *Dale v. Sollett*. 4 Burr. 2133.

The gift of the
action.

The gift of this action is, that the defendant upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money, *ibid*.

For what the Action does not lie.

For what money
had and received,
does not lie.

This action does not lie for money paid by the plaintiff, which is claimed by him, as payable in point of honor and honesty, altho' it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases, the defendant may safely retain it with a safe conscience, tho' by positive law, he was barred from recovering, 2 Burr. 1012. Nor for more than common interest for money lent on a note, altho' it was agreed, that plaintiff should have half the profits of goods on a re-sale besides, *Cowp.* 793. Nor for money paid by a lottery-office keeper to the insurer, on his insurance with him, *ibid.* 790. Nor for a return of the money

ney paid in exchange of a horse, altho' the defendant warranted his horse sound which was not, and altho' returned back as soon as discovered. *Cow.* 819. *Dougl.* 18. Nor to recover stock won in any of the public funds. 5 *Burr.* 2509. 2 *Black. Rep.* 684; or bank notes found. *Hoyes v. Price, Sittings, Hil.* 1776. Nor against an excise-officer, to recover back an over-payment. *Cow.* 69. Nor against the post-master for the value of a bank-note stolen by one of the porters of the office out of a letter delivered into the post-office. *Cow.* 754. Nor to recover back money paid for release of cattle distrained damage feasant, tho' the distress be wrongful, *ibid.* 414. Nor against an agent, if he has paid the money over to the principal, without notice. *Cow.* 566. Nor where money is paid under the probate of a will, which afterwards turned out to be forged, and declared void. 3 *Term Rep.* 125. Nor against a security of an annuity who did not receive any part of the purchase-money, after annuity declared void. 2 *Term Rep.* 360.

Cases.

In the case of *Tomkyns v. Bennett*, it was held, where one pays money on a mistake in an account, or under or by a mere deceit, it is reasonable he should have his money again; but where one pays money knowingly, on an illegal consideration, the party that receives it ought to be punished for his offence, and he that pays it is *particeps criminis*; and there is no reason he should have it again, for he parted with it freely, *et volenti non fit injuria*. 1 *Salk.* pl. 2. But in the case of *Smith v. Bromley*, Lord Mansfield says, that *volenti non fit injuria* is an absurd reason: If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have an action for so much money received; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws calculated

If money be paid
by mistake in
an account, or
by deceit.

Sk. 411. pl. 7.
6 *Mod.* 161.
Comb. 447.
Sk. 412.

Smith v. Bromley.

A broker with a commission *del credere*, paid to the assignees a sum of money which he had a right to set-off, was allowed to recover it back.

Under 5 Geo. 2. c. 30. 1. 28.

Where annuity was set aside, action held good for the money ;

but security held not liable.

lated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover ; and it is astonishing that the reports do not distinguish between the violation of the *one* sort, and the *other*. *Dougl. 697 ; vide 1 H. Bl. Rep. 65. 2 Term Rep. 763. 3 Term Rep. 17.*

The plaintiff was a broker with a commission *del credere* (a), the bankrupt an underwriter, who had underwritten policies to a large amount for the plaintiff for his foreign correspondents ; losses to the amount of 661*l.* had happened on those policies, and plaintiff had paid them to his correspondents in consequence of the *del credere*, and the bankrupt was therefore indebted to the amount of those losses to plaintiff, and the plaintiff was by him made debtor for the premiums : at the time of the bankruptcy, the plaintiff was indebted to the bankrupt in 1356*l.*, the whole of which sum, he paid to the assignees of the bankrupt, not knowing he was entitled to hold the amount of the debt due to him, as a set-off : afterwards discovering his mistake, he brought this action for the 661*l.* which he was entitled to have retained, and had a verdict. *1 Term Rep. 281. Bize v. Dickson, vide 1 Salk. 28.*

The plaintiff had paid to the defendant a sum of money for an annuity, the memorial of which not being duly registered, in pursuance of the act of 17 Geo. 3. c. 26., it was set aside, and made void by the statute ; plaintiff the grantee was allowed to recover back the money so paid, by this action. *Shove v. Webb, 1 Term Rep. 732 ; but the security, who joined with the grantor of the annuity, and who had not received any part of the purchase-money, tho' he signed the receipt, was held not to be liable. Stratton v. Rastall. 2 Term Rep. 366. vide Palm. 364.*

(a) A commission *del credere* is an absolute engagement to the principal, from the broker, and makes him liable in the first instance, *1 Term Rep. 122. Grove v. Dubois,*

A sum

A sum of money was ordered to be paid by the *high commission-court* by the plaintiff to the defendant, plaintiff was afterwards allowed to recover it back, because ordered to be paid by a *void authority*, the action being brought after the revolution.
1 Ld. Raym. 742. 1 Salk. 27.

One *Davis* forged a power of attorney of plaintiff's to receive money of the defendant *Eaton*, and he employed *Hodgson* an attorney to bring an action in the name of the plaintiff, which he did, the defendant paid money into court, and *Hodgson* took it out, and paid it to *Davis*, who absconded. The plaintiff brought his action against the defendant for the *real debt*; and the court held, that the payment to *Hodgson* was no payment to the plaintiff, but defendant was still liable, tho' the defendant may have his remedy against *Hodgson*, who had received the money under a void authority. *Robson v. Eaton. 1 Term Rep. 59.*

But where defendant, as a treasurer of the navy, was indebted to *Priestman*, in 58l.; *Priestman* died 2d June 1784, and on 13th August 1785, one *Brown* forged a paper, purporting to be the will of *Priestman*, by which he was made executor, and probate granted to *Brown*, who under such authority received from defendant the money due. The fraud afterwards appearing, the will and probate were declared void, and administration granted to the plaintiff, who brought this action for money had and received. Court said, that the defendant having paid the money to a person having authority from a court of competent jurisdiction, such payment was lawful, and he should not be compelled to pay it again. Had *Priestman* been living, the court said, the money would have been recoverable, for the ecclesiastical court would have had no jurisdiction, the party being living. *Allen v. Dundas. 3 Term Rep. 125.*

The plaintiff's brother was a bankrupt, and was induced by an agent for the defendant, who was a principal creditor, to give him 40l. to sign the

2 Str. 915.
2 Burr. 1012.

the bankrupt's certificate; the money so paid for that purpose, was allowed to be recovered back in this action, as *oppressively and unjustly extorted* from the plaintiff. *Smith v. Bromley*, Dougl. 671.

A deed of trust for the benefit of all creditors; one would not sign except he was secured full 20s. which was given, note held void.

Assumpsit on promissory note: the case was, defendants indebted to plaintiff and other creditors, and being insolvent, assigned all his effects in trust to pay 11s. in the pound to all their creditors, all consented, except plaintiff, who refused to sign deed, or receive composition, unless defendants would give him a note for remaining 9s.—defendants gave the note to that amount; and then plaintiff signed the deed.—*Resolved*, the note having been obtained under circumstances of taking advantage of the defendants' situation, and being a *fraud on the other creditors*, was void; and tho' defendants had made a subsequent promise to pay, that this should not set up that security, which was void in its creation. *Cockshot v. Bennett*, 2 Term Rep. 763.

If money be embezzled by a clerk, &c.

Where a nurse to a person on his death-bed, went off with the money of the testator which he had about him when he died, the administrator was allowed to recover back the money. *Buller N. P.* 130. *Whip v. Thomas*.

And the owner shall recover the property embezzled, tho' not in the hands of the person embezzling it; As where a clerk to the plaintiff had embezzled notes and money of his to a considerable amount, which he paid away in the insurance of tickets in the lottery to the defendant, which insurance was contrary to stat. 12 Geo. 3. c. 36. s. 3. It was held, that as these notes and money were not paid *bona fide*, but for an *illegal consideration*, and their identity could be traced, that the real owner should recover them. *Clarke v. Shee & al.*, Cowp. 197.

If one recovers money *malâ fide*, by suit in inferior court, may be recovered back.

The plaintiff had been sued in an *inferior court*, and *bad matter of defence*, which if he could have *pleaded*, would have *discharged him*, but which, from

from the nature of the court, he could not have, and so had judgment there against him; he recovered the amount of such money so paid under the judgment by this action. *Moses v. Macfarlan*, 2 Burr. 1005. 1 Black. Rep. 219. S. C.

Money may be recovered by a right and legal judgment, and yet the iniquity of keeping that money may be manifest, upon grounds that could not be used by way of defence against the judgment. *Ld. Mansfield*. Tho' money be recovered by a right and legal judgment, yet there may be grounds not to keep it.

Defendant levied money by seizing and selling the plaintiff's goods, under a justice's warrant, founded on a conviction, which was afterwards quashed; it was holden, that an action for money had and received then lay, for the clear money then produced by the sale. *Bull. 131, Feltham v. Terry*. As where a seizure was made on a warrant of conviction, which was quashed.

Action for money had and received, brought against defendants, as partners and keepers of a lottery-office, to recover back a sum of money paid for insuring tickets in the lottery of 1781; the court held, on a motion to set aside the nonsuit, that the plaintiff should recover. *Jacques v. Wisby*, 1 H. Black. Rep. 65. S. P. 2 Black. Rep. 1073. *Jacques v. Golightly*. Insurances in the lottery are illegal in the office-keeper; if money be paid, it may be recovered.

But where both parties are made criminal, in such case, the money cannot be recovered back again, as on the stat. 7 Geo. 2. c. 8., the stock-jobbing act. *Per Blackstone, J. ibid.* But if both be made criminal;

But where the lottery-office keeper had paid the monies lost on the insurances, it was held, he could not recover those monies back again; for the illegal act had been done by himself, in making the insurance, and he having paid the money, from a motive of honesty, tho' not compellable by law, he shall not recover it back. *Browning v. Morris*, Cow. 790. and if the money be paid by the office-keeper, he cannot recover it back.

In respect to Sales by Auction.

This action may be brought either at the suit of the vendor for the price of the thing sold, which is on the *express contract*, or of the vendee to recover back the money he has paid to the auctioneer on the sale, wherein some defect appearing in the thing sold, or fraud in the vendor; *on the implied undertaking*.

An auctioneer is liable to a bidder's action for deposit, where the bidder has sufficient reason not to proceed.

Auctioneer ought not to part with money.

If title be not good.

As where the defendant was an auctioneer, and in that character had sold to the plaintiff an interest in land, for which the plaintiff had paid him 50*l.*; but upon an objection to the title, and the want of disclosure of certain circumstances which ought to have been disclosed at the time of bidding, the plaintiff (the purchaser) declined going on with the contract; and in the opinion of the court she had sufficient reason for so doing: She therefore required the auctioneer to pay her back his deposit; —he refused, whereupon the bidder brought this action against him. The auctioneer paid 8*l.* into court.—Verdict for plaintiff—*Motion for new trial*. The court were clear the action laid. The money does not appear to have been paid over by him to his principal. But if it had been so, yet the objection appears to have been made *before* it either was, or ought to have been so paid over. He was a stake-holder, a mere depositary of 50*l.*, and ought not to have parted with it, till such time as the sale should be finished and completed, and it should appear in the event to whom it properly belonged. They also thought the auctioneer had acknowledged himself liable to the action, by paying money into court. Rule for new trial discharged. *Burrough v. Skinner*, 5 Burr. 2639.

But where the title is not good, the purchaser can only recover back the *deposit with interest*, and not farther damages for the loss of his bargain. *Flureau v. Thornhill*, 2 Black. Rep. 1078.

On

On the sale, the condition was, that a deposit should be made of 25*l.* per cent. on the whole purchase-money. It was ruled that it need not be an exact 25 per cent. on the whole amount, but that if any money was paid as a deposit, and accepted as such by the auctioneer, that it was sufficient to bind the bargain. *Ld. Kenyon. Hanson v. Rober-* *Sitt. G. H. E.*
deau. And it was held in *Pordage v. Cole*, that ^{1792.} whatever sum is paid for earnest, or as a deposit, is to be deemed part of the price when the goods come to be paid for. *1 Saund. 319.*

If money and a horse, are given in exchange for another horse, warranted sound, which proved unsound at the time. This action is not proper to try the warranty, nor will trover lie for the horse given in exchange; because the property is altered. *Power v. Wells, Cow. Rep. 818. Same v. do.*

Money had and received will not lie, when payment has been made on a contract which is still open, and not given up by defendant.

Action for money had and received. It appeared that the defendant, in consideration of 70 guineas, had sold him a pair of coach-horses, which he undertook to take back, if plaintiff should disapprove of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their stead, without making any new agreement; these he also returned within a month, and received a third pair on the 23d of December, without any fresh bargain. This third pair he disapproved of, because restive, and would not draw, and offered to return them on the 5th of January, but refused to be taken. A nonsuit was recorded—Rule to set it aside, and a new trial. *Lord M.*—Where there is a special contract, the defendant ought to have notice by the declaration, that he is sued upon that contract.

The like case, where a 3d pair of horses were received without a fresh bargain.

Ashurst, J. If the plaintiff had demanded the 70 guineas, and brought his action, on the return of the first pair of horses, and no second pair had been sent, this action would have lain; but here the contract was continued, and the case resembles *Power v. Wells. Buller, J.* This action will not

lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses. *Rule abs. Weston v. Downes, Dougl. 23.*

10 guineas paid for chaise and harness, on condition to be returned, if plaintiff's wife disapproved, paying 3s. 6d. per day for the hire. It was not approved, and sent back, and hire tendered.

This was an action for money had and received; —verdict for plaintiff—on motion for a new trial. The case was: that the plaintiff had paid 10 guineas for a one-horse chaise and harness, on condition to be returned in case plaintiff's wife should not approve of it, paying 3s. 6d. per diem for the hire. This contract was made by a servant, but the plaintiff did not object to it. The plaintiff's wife not approving of the chaise, it was sent back in three days, and left on the defendant's premises, without a consent on his part to receive it. The hire of 3s. 6d. per diem was tendered, and refused, as well as to return the money. *Asbburst, J.* This is like the common cases where either party puts an end to a conditional agreement. Here the condition was to return the chaise if not approved of; therefore the moment it was returned, the contract was at an end, and the defendant held the money against conscience and without consideration.

Buller, J. of same opinion. The distinction between those cases, where the contract is open, and where it is not so, is this, if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back the whole money, and then an action for money had and received will lie; but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract. In a late case before me on a warranty of a pair of horses to *Dr. Compton*, that they were five years old, when in fact they turned out to be four; and they were not returned within a certain time: I held, that if the plaintiff would rescind the contract entirely, he must do it within a reasonable time, and that as he had not rescinded the

Dr. Compton's
calc.

the contract, he could only recover damages; and that the question was, What was the difference of the value of four or five years old? So that the difference in cases of this kind is this; where the plaintiff is entitled to recover his *whole money*, he must shew the contract is at an end; but if it continue open, he can only recover damages, and then he must *state the special contract*, and the *breach of it*. *Towers v. Barrett*, 1 Term Rep. 133.

In case goods be taken in execution, which are ^{If goods be taken in execution.} not the property of the persons against whom an execution is taken out; the owner may waive the trespass, and bring his action for the amount of the money which the goods sold for. *Feltham v. Terry*, Cowp. 419. So in case goods be taken and sold under a warrant of distress under a conviction; if the conviction is quashed, the owner may waive the tort, and bring the action for money had and received. *Ibid.*

If money be paid to an agent or receiver by mistake, ^{Money paid to agent by mistake.} and he has paid it over to his principal, he is not liable in an action by the person who mispaid it; for he should not suffer for another's mistake, but the payer should resort to the principal himself. *Buller v. Harrison*, Cowp. 566. But if before he has paid the money to his principal, the person corrects the mistake, the agent cannot afterwards pay it over without making himself liable. And if there was no new credit, no acceptance of new bills, no fresh goods bought, or money advanced for his principal, the merely passing it in account is not a payment over. *Ib.* 568.

A. being indebted to B. for brokerage, and B. indebted to C. for money lent, B gives an order to A. to pay to C. the sum due from A. to B. as a security; on which C. lends B. a farther sum, and the order is accepted by A. On the refusal of A. to comply with the order, C. may maintain an action against A. for money had and received. *Israel v. Douglas and another*, 1 H. Black. Rep. 239. *Wilson, J. contra.*

If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in *England*, by virtue of which he attaches, and receives after the assignment, money due to the bankrupt in the *West Indies*, the assignees may recover the money in an action for money had and received. *Sill & al. v. Warswick*, 1 *H. Black. Rep.* 665.

Stake holder.

sic Comb. 303.

If a stake-holder receives money of both parties pending a wager, the *winner* may maintain the action against the *stake-holder*; for upon the wager being won, the money is actually the winner's, tho' he cannot recover it before the fact is made appear. 10 *Mod.* 315. *Holt's Rep.* 37. *Sid.* 4. *Show.* 157. He must at his peril take notice who it is that wins the wager. *Per North, C. J. Freem.* 264.

Wager on event of a battle.

But if a wager be deposited with a stake-holder, on the event of a battle to be fought by the parties laying the wager, and it be *not paid over*, tho' the battle be fought, either party may recover from the stake-holder the sum deposited by him. *Cotton v. Thurland*, 5 *Term Rep.* 405. Had he paid it over, *Lord Kenyon* said, perhaps he would not have been answerable. *Ibid.* 409.

Sheriff levies on a *fi. fa.*

If a sheriff levies upon a *per i facias*, the plaintiff may have an *indeb. ass.* against him for so much money received to his use. *Comb.* 430. So if the sheriff dies, an action lies against his executor. *Salk.* 12. pl. 2. *Ld. Ray.* 40. 4 *Mod.* 403. *Cro. Car.* 297.

Where money is paid and the thing contracted for not delivered, it is money received to his use.

A man paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. Upon this the other brings his action for the money, as so much money had and received to his use: and the *Chief J.* held it will lay; because the thing contracted for was not delivered: He said it would have been otherwise, if the thing contracted for had been delivered, tho' to a less value. 1 *Str.* 407. *Anon. Cow.* 296.

The

The plaintiff paid money on a promise to transfer stock at a *future day*, which not being done, he brought his action for money had and received. The court held, the action was well brought; not for the whole money paid, but the damages, in not transferring the stock at that time, which was a loss to the plaintiff, and an advantage to the defendant, who was receiver of the difference-money, to the use of the plaintiff.

Dutch v. Warren, 1 Str. 406.

On a contract for stock, the party who has the difference in his hands, is receiver to the other's use.

Declarations in Assumpsit.

Declaration for
money had and
received in K.
B. by bill.

Implied compo-
ssit.

It is usual to add
this count.

London. } *JOHN Denn* complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, *For that whereas* (a), the said *Richard*, on the second day of *November*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John*, in 50*l.* of lawful money of *Great Britain*, for money by the said *Richard* before that time had and received, to and for the use of the said *John* (b); and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, understood, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *John*, of and concerning divers other sums of money from the said *Richard* to the said *John* before that time due and owing, and then being in arrear and unpaid, and upon that account, the said *Richard* was then and there found in arrear and indebted to the said *John*, in other 50*l.* of like lawful money; and being so found in ar-

(a) On implied promises, it is usual to count by way of a general *indebitatus assumpsit*. 1 Salk. 23. Comb. 447. 5 Mod. 13. 1 Show. 157.

(b) Altho' the money be received of several persons, to the use of the plaintiff, yet the count need not shew of what persons in particular; because the consideration is executed, and not traversible. *Mor* 854.—If the declaration has a blank for a day, or place, or other material thing, whereby it is insensible, it is bad. 2 Cro. 258.

rear and indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum, of money, when he should be thereto afterwards requested: Yet (a) the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John* the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 100*l.*, and therefore he brings his suit, &c.

John Doe,

and

Richard Roe:

Pledges to prosecute

If a person has laid out or expended his money for the use of another at his request, the law implies a promise of re-payment, and an action will lie on this *assumpsit*. Money laid out,

As where a surety has paid a debt, for which he had joined another in a bond, it was held, that he could maintain this action against the principal, it being money paid to his use. *Decker and wife v. Pope, Sitt. Trin. 1757. Ld. M.* But not if he had taken a bond for the amount of the sum engaged for, 2 Term Rep. 100. Surety.

(a) Many pleaders put the common conclusion in these words: yet the said *Richard*, not regarding his aforesaid promise and undertaking, so by him made in this behalf as aforesaid, but contriving, and fraudulently intending craftily and subtilly to deceive and defraud the said *John* in this respect, hath not yet paid the said sum of money, or any part thereof, to the said *John*, (altho' so to do, the said *Richard*, afterwards, to wit, on the day and year aforesaid, and often afterwards, to wit, at *London* aforesaid, in the parish and ward aforesaid, was requested to pay him the same,) but he to do this, hath hitherto wholly refused, and still refuses, to the said *John*, his damage of, &c.

There is no occasion to charge the defendant in the conclusion with any species of fraud at all; but merely a breach of the promise on which the action is founded, as by saying he did not pay on request, which is sufficient. *R. Jones, 228.* In these actions no occasion to charge defendant with fraud.

If

Bail.

If two persons become bound for *A.* in a *retrogratizance of bail*; and pay the money for him under an execution (or previous, where they have been fixed with the debt) they may bring this action against the principal, for the money so paid.

Where this action will not lie.

But where it appeared to be the custom of the parishes of *St. Vedast*, and *St. Michael le Queen*, to elect a sexton jointly, and each parish to pay a moiety of the salary. *St. Michael's* had claimed a right to have a separate sexton, and gave notice to that effect, to the parish of *St. Vedast*. *St. Vedast* paid to the sexton last chosen, and then in possession, the whole salary; and then brought an action against *St. Michael's* for the moiety, and adjudged it could not be maintained, for the money was paid, clearly against the consent of the parish of *St. Michael*; and so no undertaking implied. *Stokes v. Lewis*, 1 Term Rep. 20.

Money paid by one on an illegal contract, made by two.

So where the plaintiff and defendant agreed to buy stock and tickets for time, and on speculation, by a broker, which they did; and being losers, plaintiff paid all the money, and brought his action for the moiety so paid: It was held the transaction being illegal by the stock-jobbing acts, that the action could not be supported. *Tbwaite v. Warner*, Trin. 1773, London Sittings.

But where a broker has paid the money by direction of him who has made the illegal contract, it will lie.

In *Petrie v. Hannay*, it was laid down, That as between the parties themselves to the illegal transaction, where one paid money for the other, in pursuance of the illegal contract, without his directions, that the money so advanced could not be recovered; for as the party himself was not compellable by law to pay, he should not be obliged to do that circuitously, which he could not be compelled to do directly; but that if one party by the other's direction, and with his assent, pays money which has become due on an illegal transaction, that such money is recoverable by the party who has paid it, as paid by the other's order and direction. 3 Term Rep. 418.

Declaration for money paid, laid out, and expended by original.

Middlesex, to wit. Richard Fenn, late of *Wiltshire*, in the said county, yeoman, was attached

to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John* by *J. S.* his attorney, complains, *For that whereas*, the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for money by the said *John* before that time laid out, expended and paid for the said *Richard*, at his special instance (a) and request, and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money when he should be thereto afterwards requested. It is usual to add an *in simul computasset*, as in the last precedent; Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said sum of money, or any part thereof, to the said *John*, but to pay the same, or any part thereof, to the said *John*, he the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John* his damage of 40*l.*, and therefore he brings his suit, &c.

Breach.

If a person has lent money to another, the law implies a promise of re-payment, and an action will lie on the *assumpsit*. Money lent.

But this action will not lie for money lent to the son, at the father's request: But had it been for so much money paid by the plaintiff, at the request of the defendant the father, to the son, it might have been good; for then it would be the father's

But it will not lie for money lent the son at father's request.

(a) In actions for money lent and laid out, it is necessary to state, it was so lent or laid out, at the request of the defendant; *Cro. Eliz.* 218; and that in consideration of which, he undertook and promised to pay, 2 *Str.* 793, *Lee v. Welch*; it is error otherwise. The breach ought to follow the undertaking stated, or the plaintiff cannot have judgment. 1 *Vent.* 64, and conclude *ad damnum of the plaintiff*.

If the plaintiff demands more than is due, it does not prejudice. 1 *Lev.* 57. But if he demands less, he cannot recover greater damages than laid. 2 *Cro.* 128. 1 *Lev.* 58.

Declarations in Assumpsit.

debt, and not the loan's. *Butcher v. Andrews*,
Carth. 446. *Comb.* 470. 2 *Brownl.* 40.

A parol loan of
 money lent to
 play with, is not
 void.

The plaintiff and defendant gamed together, at
 tossing up for 5 guineas a-time. The plaintiff
 having won all the defendant's ready money, lent
 him 10 guineas at a-time, 'till he had borrowed
 120 guineas. The Chief Justice held, this *not* to be
 a case within the act of 9 *Ann.* c. 16, for there is
 not the word *contract* (as in the statute of usury) and
 the word *securities*, as it stands in this act, must
 mean lasting liens upon the estate. The plaintiff
 obtained a verdict for 12*l.* The parliament might
 think there would be no great harm in a parol con-
 tract, where the credit was not likely to run very
 high; and therefore confined the act to written
 securities. *Barjeau v. Walmsley*, 2 *Str.* 1249.
 1 *Black. Rep.* 234. 256.

If bill or note be
 given for money
 won, it cannot
 be recovered,
 but if money be
 lent at same time,
 the money lent
 may be recov-
 ered.

Where a bill was given for 67*l.*, part of which
 was for money won at play, and other part *money*
lent, at the time and place of play; the play being fair,
 it was adjudged, that the bill was void by *stat.*
 9 *Ann.*; but the *contract* was *divisible*, and that part
 of it, which had arisen on a good consideration, (*the*
money lent,) might be recovered. *Robinson v.*
Bland, 2 *Burr.* 1078. There was a count for
 money lent. *Carth.* 356. 5 *Mod.* 175. 1 *Salk.*
 344. 1 *Ld. Ray.* 87. 2 *Str.* 1155.

Infant.

It will not lie for money lent to an infant, tho'
 for necessaries. *Salk.* 279. *Darby v. Boucher*.

In this action a
 note of hand
 may be given in
 evidence.

In common cases upon an assumpsit for *money*
lent, the plaintiff may give a promissory note of the
 defendant's in evidence, for the statute of the 3*d*
 and 4*th Ann.* c. 9. (which enables the plaintiff to
 sue on the note) only gives an *additional* remedy,
 but does not take away the old one. *Story v. At-*
kins, 2 *Str.* 719. Vide *Salk.* 23 *Hard's Case*.
 Where it was held, it might be given in evidence
 as a paper or writing, to prove the defendant's re-
 ceipt of so much money from the plaintiff. And
 a bill of exchange may also be given in evidence,
 on an *indeb. assump.* *Lutw.* 1585.

So a bill of ex-
 change.

The

The usual mode of declaring for foreign coin ^{For foreign money.} lent, is to state *for so much foreign coin lent and advanced,* amounting to so much in *English money.*

1 *Leon.* 41.

If money be lent to the wife at request of the husband, it may be so stated in the declaration, for such a loan is to be considered as a loan to the husband, they being but one person. *Stephenson v. Hardy.* 3 *Wils.* 388. ^{Money lent to wife.}

In an action for money lent, the defence was, that the plaintiff kept a common gambling-house, that defendant having lost all his money, applied to plaintiff for the loan of some money for continuing the play, which plaintiff lent him. *Lord Kenyon* held it recoverable, for the stat. 9 Ann. only avoided securities for money lent to play with, and did not extend to cases of mere loans, without any security taken. *Wittenhall v. Wood, Esq.* T. 1793. ^{play with, is recoverable.}

Oxfordshire, to wit. John Denn complains of *Richard Fenn*, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, of a plea of trespass on the case; For that whereas, the said *Richard*, on the 6th day of October, in the year of our Lord 1794, to wit, at Oxford in the said county, was indebted to the said *John*, in 60*l.* of lawful money of Great Britain, for money by the said *John* before that time, lent (a) and advanced to the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Oxford aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the

a) The word *lent* is a technical term, and no man can be indebted to another for money lent, unless the money be actually lent to that person himself. Therefore, in an action for money lent to *James Dalrymple* instead of *James Lyfter*, the judgment was arrested, because there cannot be a double debt upon a single loan. *Marriot v. Lyfter*, 2 *Wils.* 141. But if the plaintiff had declared for money delivered to such a person at the request of defendant, it had been otherwise.

Declarations in Assumpsit.

said *John*, to pay him the said sum of money, when he should be thereto afterwards requested; (*add a count on an insimul computasset as in the first precedent:*) Yet the said *Richard* (altho' often requested, &c.) (a) hath not yet paid the said several sums of money, or any part thereof, to the said *John*. But the said *Richard*, to pay the same or any part thereof to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John* his damage of 100*l.* and therefore he brings his suit, &c. Pledges, &c.

For foreign money lent.

Was indebted to the said *John* in 1000 florins of foreign money, being of a large value, to wit, of the value of *£*. of lawful money of *Great Britain*. for so much of the said foreign money, by the said *John* before that time lent and advanced to the said *Richard*, and at his special instance and request, and being so indebted, &c. he, the said *Richard*, in consideration thereof, afterwards, &c. undertook, &c.

As the plaintiffs demand may be for money lent, laid out, and had and received, it is usual to place the demand upon several counts, and also to add thereto, a count upon an insimul computasset, which will be thus:

Declaration for money paid, lent, had, and received, and an insimul computasset.

London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, of a plea of trespass on the case, For that whereas, the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for money by the said *John*, before that time laid out, expended, and paid for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish

(a) In assumpsit for money lent on a mere duty, *licet sapienter visus* is sufficient. *Co. Eliz.* 73. *Telv.* 66. *Co. Eliz.* 218. and

and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Richard* Money lent. afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John*, in other 100*l.* of like lawful money, for money by the said *John* before that time lent and advanced to the said *Richard*, and at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Richard*, Money had and received. afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for money by the said *Richard*, before that time had and received, to the use of the said *John*, and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested. *And whereas*, the said *Richard*, after- Infimus compo- wards, to wit, on the same day and year aforesaid, tasset. at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *John*, of and concerning divers other sums of money, before that time due and owing from the said *Richard* to the said *John*, and then being in arrear and unpaid, and upon that account, the said *Richard* was then and there found in arrear and indebted to the said *John*, in other 100*l.* of like lawful money, and being so found in arrear and indebted, he the said *Richard*, in consideration thereof, after- wards,

wards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, (a) undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money when he should be thereto afterwards requested: Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*, but he to pay the same, or any part thereof, to the said *John* hath hitherto wholly refused, and still refuses, to the said *John* his damage of 200*l.*; and therefore he brings his suit, &c. pledges, &c.

In simul computasset.

Indebitatus assumpsit will lie upon a *stated account*, as between two merchants, or other persons; the law implies that he, against whom the balance appears, has engaged to pay it to the other, tho' there be not any actual promise to pay. And from this implication it is frequent for actions on the case to be brought, declaring, that the plaintiff and defendant had settled their accounts together (*in simul computasset*), which gives name to this species of assumpsit, and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. If the account stated be between merchant and merchant, the balance carries interest from the time it is liquidated. So likewise where money lent becomes due, from the day it becomes payable; but for money owing for goods sold, or work done, no interest shall be allowed. *Blaney v. Hendricks*, 3 *Wils.* 205.

Interest.

If *A.* sell a horse to *B.* for 10*l.*, and there being divers other dealings between them, if they come to an account upon the whole, and *B.* is found in arrear, it is said, *A.* must bring his *in simul computasset*, 2 *Mod.* 43. and not an *indebitatus assumpsit* on the first contract.

(a) *Super se assumpsit* was held to be necessary; for the law does not create a promise in any case in pleading, but gives sufficient evidence to a jury to find a promise. 6 *Mod.* 131.

The plaintiff and defendant entered into articles of partnership, in which a covenant was, to account at certain times, and an account was taken, and balance struck, which was proved expressly, that defendant promised to pay. In *assumpsit* on an *infirmul computasset*, Buller J. held, that the action well lay, as founded upon the express promise.

Moravia v. Levi, 2 Term Rep. 483. So where a like balance was struck on the dissolution of a partnership, and an account stated, containing that balance, and also other articles not connected with it, which defendant promised to pay, court held, this action lay for it. *Ibid.* 477. *Foster v. Allanson*.

The count, on an *infirmul computasset*, need not shew how, and for what, but generally, that on such a day, year, and place, the defendant *infirmul computasset* with the plaintiff, of divers sums of money due and owing from the defendant to the plaintiff, and upon that account, the defendant was found in arrear to the plaintiff in so much, and in consideration thereof, did promise, &c. 2 Cro. 207.

Assumpsit against an infant, one count in the declaration was an account stated, and a general verdict; judgment was arrested, for such count is bad as against an infant, who is not to be presumed to be competent to enter into an account. 1 Term Rep. 40. *Truman v. Hurst*.

The plaintiff may now recover part of the sum demanded on this count, as well as on any other, evidence of an account current and unliquidated, for that would involve the court in a tedious examination. The account therefore must be exhibited as an account stated. 2 Keb. 781. *Lincoln v. Parr*.

A plea to an action of assumpsit of an account stated is bad in law, and may be demurred to, *Rhodes v. Baines*, 1 Burr. 9.; for an account without payment or release, is no plea to *indebitatus assumpsit*, 3 Lev. 238. for a chose in action cannot discharge a matter executed.

Declarations in Assumpsit.

In simul computasset and payment, amount to the general issue. 5 Com. Dig. 218.

As to evidence
on inquiry.

In all actions for *money had and received*, *money lent*, or *money paid*, the debt must be proved on a writ of inquiry, as well as on a trial; for, by the judgment by default, the plaintiff is to recover, but the *quantum* is to be inquired into by the jury: and if the plaintiff is to recover, and he proves nothing, he must be content with a penny, or some such small matter of damages; but altho' he recover only 1d. damages on inquiry, yet he must have his *extra* costs.

The same with respect to work done, or goods sold and delivered, the proof must be *the work done*, and *the value*; as also the *goods delivered*, and *their value*.

As to Assumpsits on a quantum meruit or quantum valebat.

There are *implied contracts* which do not arise Assumpsit on quantum meruit. from the express determination of any court, or the positive direction of any statute, but from natural reason and the just construction of law, which extends to all presumptive undertakings or assumpsits; which, tho' never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, *that every man hath engaged to perform what his duty is, or justice requires.* Thus, if I employ a person to transact business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury, by bringing his action on the case upon this *implied assumpsit*; wherein, he is at liberty to suggest that I promised to pay him so much as he reasonably deserved to have, and then to aver, that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury, who will assess such damages as they think he really merited. This is called an assumpsit on a *quantum meruit*.

There is also an *implied assumpsit on a quantum valebat*, Assumpsit on a quantum valebat. which is very similar to the former, being only, where one takes up *wares* of a tradesman without *expressly agreeing for the price*. There the law concludes, that both parties did intentionally agree, that the *real value* of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

It is generally usual in actions upon the case, to Usual in actions on the case to set forth different counts. set forth several cases, by *different counts*, in the same *different counts*.

Declarations in Assumpsit.

same declaration, so that if the plaintiff fails in the proof of one, he may succeed in another. But as the defendant may now obtain an order for a particular of the plaintiff's demand, he is to take *especial care* that such counts agree with the demand delivered, or the defendant may have the *superfluous counts struck out, at the plaintiff's costs*.

It is to be remembered, that the proofs on behalf of the plaintiff ought to tally with some of the counts; therefore *for work done, and money lent*, it was given in evidence, that both had mutual dealings together, that they had come to an account, and that defendant on the balance was in arrear 5*l*. For want of a count on an *insumt computasset* the plaintiff was nonsuited. *Bull. N. P. 129. May v. King.*

For work done,
or goods sold,
how to declare.

In an assumpsit for work done, or goods sold and delivered, the plaintiff counts or declares first upon an *indebitatus assumpsit*, or a settled and agreed price between him and the defendant; as that they bargained for 20*l*.; and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, or *quantum meruit*, (more usual the latter,) that the defendant bought *other goods*, or that the plaintiff did *other work for him*, and that he agreed to pay him so much as *they were worth* (or that *he deserved to have*), and then avers, that *they were worth* (or that *he deserved to have*) other 20*l*.; to which is usually added, a count for *money expended and paid*, and an *insumt computasset*, and concludes with the defendant's refusal to fulfil any of these agreements or promises, whereby he is damaged to such a value. And if he proves the case laid in any *one of his counts*, tho' he fails in the rest, he shall recover proportionable damages.

Declaration for
goods sold and
delivered, money
paid, and
insumt compu-
asset.

London, to wit. John Denn complains of Richard Fenn, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, of a plea of trespass on the case, For that whereas, the said Richard, on the 6th day of October in the year of our Lord 1794, to wit,
at

Declarations in Assumpsit.

203

at *London* aforesaid, in the parish of *Saint Mary-le-Bow* in the ward of *Cheap*, was indebted to the said *John* in 100*l.* of lawful money of *Great Bri-*
tain, for divers goods, wares, and merchandises, by the said *John* before that time sold and delivered to the said *Richard*, at his special instance and request, and being so indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John* to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard* divers other goods, wares, and merchandises, he, the said *Richard*, undertook, and then and there faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he, the said *Richard*, should be thereto afterwards requested: And the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for money by the said *John* before that time laid out, expended, and paid, for the said *Richard*; and at his request, and being so indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said

Need not specify
the particulars.
Cr. Jac. 206.

Quantum meruit
thereon.

Quantum meruit
for wares sold,
alleging no
notice of the
value demanded
per cur. the
notice is not
traversable; for
he that *buyeth*
must know the
value, and may
tender so much
as he thinks it
is, and plaintiff
must go on for
the rest. *Lomas*
v. Byles, 3 *Keb.*
610.

Money paid.

Original complaint.

said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas* the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *John* of and concerning divers other sums of money (a) from the said *Richard* to the said *John* before that time due and owing, and then in arrear and unpaid, and upon that account the said *Richard* was then and there found to be in arrear and indebted to the said *John* in other 100*l.* of like lawful money, and being so found in arrear and indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *Yet* the said *Richard* (altho' often requested, &c.) (b) hath not yet paid the several sums of money, or any part thereof, to the said *John*. But to pay the same, or any part thereof, to the said *John*, he, the said *Richard*, hath hitherto wholly refused, and still refuses, to the said *John* his damage of 100*l.*, and therefore he brings his suit, &c. Pledges, &c.

Breach.

I have looked into the ancient books of entries, where I find many declarations upon *common assumpsit*, on the *quantum meruit*, or *quantum valebat* only. If this was adapted, it would shorten the length of pleadings in common cases very much, where the right will be upon the plaintiff to recover on

(a) In regard the account may be for *divers matters and causes*, and *several matters* may be included *therein*, which, in *pode compositi*, are reduced to a certain sum; it is sufficient ground to maintain the assumpsit without specifying the *particular matters and causes*. *Cro. Car.* 116.

(b) When the promise is founded upon a debt, as for wares bought of the plaintiff, he promised to pay 10*l.* upon request, there the plaintiff need not allege the request more precisely than in an action of debt, *hinc sapius requiritur*, &c. 2 *Roll. Rep.* 62. *Hill v. Wood.*

these counts. In most actions for tradesmen's bills, the plaintiff recovers not on the *price agreed on*, but upon the *quantum meruit*, or *quantum valebat* only.

The plaintiff, an auctioneer, was employed by one *Crown* to sell his goods by auction. The sale was at *Crown's* house, and the goods known to be his property. The defendant bought to the value of 7*l.* 9*s.* 6*d.*, and, after packing them in a cart prepared ready, paid plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hand for five guineas, as for *q. deb. due from Crown to defendant*. Whilst plaintiff was hesitating about the propriety of taking the receipt, defendant drove off with the goods. Afterwards the plaintiff, being called on by *Crown*, paid to him (who refused to accept the receipt) the whole sum, for which the goods were sold to defendant, and brought this action *for goods sold and delivered, with the usual money, counts to recover the five guineas*. *Verdict for plaintiff*.—Motion to set it aside, or that a nonsuit be entered. Lord *Loughborough*: I entertain no doubt that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference, whether the sale be on the premises of the owner, or in a public auction-room; for on the premises of the owner, an actual possession is given to the auctioneer, and his servants, by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission and the auction duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment; if it be otherwise, the auctioneer gives credit to the vendee entirely at his own risk. *Heath J.* said, If the goods be stolen, the auctioneer might maintain trespass, or an indictment for larceny; he therefore has a special property in them, which is all that is necessary to support

An auctioneer, employed to sell the goods of a third person by auction, may maintain an action, for goods sold and delivered, against a buyer, tho' the sale was at the house of such third person, and the goods were known to be his property.

The cases cited in support of the rule were, *Cowp.* 255. *Buller, N. P.* 130. 1 *Term Rep.* 20.; against the rule, 1 *Term Rep.* 619. 2 *Black. Rep.* 998. 2 *Burr.* 1005. *Buller* 280. 3 *Burr.* 1921.

support this action. He is agent for each party in different things, but not in the same thing. When he prescribes the rules of bidding, and the terms of the sale, he is agent for the seller; but when he puts down the name of the buyer, he is agent for him only. Here the deposit was to be paid to the auctioneer, who had a sufficient property to maintain this action. *Rule discharged. Williams v. Millington, 1 H. Black. Rep. 81.*

Assumpsit will not lie for goods sold, &c. where the buyer has given a bill or note, till the time is expired.

If in payment of a debt the creditor is content to take a bill or note, payable at a future day, he cannot legally commence an action on his *original debt*, until such bill or note becomes payable; or default made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawers in his hands, and who therefore refuses it, in such case, he may consider it as waste paper, and resort to his original demand, and sue the debtor on it. *Ld. Ken. Stedman v. Goech, E. T. fitt. 33 Geo. 3. at W.*

Notes.

Proof.

In actions for goods sold and delivered, the usual proof required is, 1. *The sale and delivery*, or the delivery to defendant by his order; 2. *The value of the goods so delivered.*

Shop books, when good evidence.

By stat. 7 Jac. 1. c. 12, it is enacted, *That the shop book of a trader shall not be evidence after the year*; but it is not evidence *within the year*, except under particular circumstances, as where no better evidence can be had; that is, if the person is living who delivered the goods, he must be produced, for that is the best evidence.

Servant who made entries, and dead.

But where it was proved, that *the servant who made the entries was dead*, proof of that, and of his hand-writing to the entries, and that he was accustomed to make entries, was held good, and no other proof of the delivery was held necessary. *Salk. 690. Pitman v. Maddox.*

So where beer was furnished, the evidence was, Draymen. that it was the usual way of the plaintiff's dealing for the draymen to come every night to the clerk of the brewhouse, and give an account of the beer delivered out, to which the draymen set their hands. This being proved, and that the drayman was dead who had delivered the beer to defendant, *with his hand-writing subscribed* to the book, it was held sufficient. Had he been living, he must have been produced. *Price v. Lord Torrington*, 1 Salk. 285. But where a book, which belonged to the plaintiff's cooper who was dead, was produced to prove the delivery of wine, and whose name was set to several articles as wine delivered to defendant, and a witness ready to prove his hand-writing, it was refused by the C. J. *Clerk v. Bedford*, Bull. 282. This differs from the above case. (There the witness saw the draymen, who made the delivery, signed every night.)

In an action for goods sold and delivered, the witness, who proved the delivery, took it from an account which he held in his hand, which he said was a copy of the day book left at home. Baron Legge said, That if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, that he might make use of it; but if he could not swear to the delivery, further than as finding them as entered in his book, that the original should be produced. And the witness saying that he could not swear from recollection, the plaintiff was nonsuited. *Tanner v. Taylor*, Hereford Lent Ass. 1756. MSS. Vide *Ld. Ray.* 745.

In a trial concerning the delivery of goods according to agreement, one Morley, a factor for plaintiff, who made the contract with defendant, and was to have 1s. in the pound for selling, was admitted as a good witness; that as a factor, he was concerned both for the vendor and vendee, was a mere go-between, and might be a good witness for either of them. *Dixon v. Cooper*, 3 Wils. 40. Vide *Rep. Temp. Hard.* 358. Lord

The witness may have a paper to refresh his memory.

A factor, who sells, is a good witness to prove contract and sale.

Declarations in Assumpsit.

Entries in books,
can only be
proved by the
clerk who made
them.

Lord *Kenyon* : Entries in the books of bankers; or persons keeping books respecting their trade or business, can only be proved by the clerks who made the entries, inasmuch as they may have some material evidence, independent of the mere entry in the books, from having some acquaintance with the dealings upon which the entries are founded. He therefore refused evidence of the hand-writing of a clerk making such entries, altho' he was proved to be gone to the *East-Indies*. *Cowper v. Marsden, E. 33 Geo. 3. Sittings.*

Declaration for
work and labor
generally in C. P.

Oxfordshire, to wit. *Richard Fenn*, late of *Oxford*, in the said county, yeoman, was attached to answer *John Denn*, in a plea of trespass on the case, and whereupon the said *John*, by *John Stokes* his attorney, complains, *For that whereas*, the said *Richard* on the 10th day of *July*, in the year of our Lord 1794, to wit, at *Oxford*, in the said county, was indebted to the said *John*, in 50*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence of him the said *John*, by him the said *John* before that time done, performed, and bestowed, in and about the business of the said *Richard* and for the said *Richard*, he the said *Richard* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, undertook and faithfully promised the said *John* to pay him the said sum of money, when he should be thereto afterwards requested : *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, in consideration that the said *John* at the like request of the said *Richard* had before that time done, performed, and bestowed, other his work and labor, care and diligence in and about other the business of the said *Richard* and for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested ;

Quantum meruit
thereon.

requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *Oxford* aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, was indebted to the said *John*, in other 50*l.* of like lawful money, for money by the said *John*, before that time laid out, expended, and paid for the said *Richard* at his like request; and for other money by the said *John*, before that time, lent and advanced to the said *Richard* at his like request; and for other money by the said *Richard*, before that time, had and received, to the use of the said *John*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, undertook and faithfully promised the said *John*, to pay him the said last mentioned sum of money, when he should be thereto afterwards requested. *And whereas*, the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, accounted together with the said *John*, of and concerning divers other sums of money, before that time, due and owing from the said *Richard* to the said *John*, and then in arrear and unpaid, and upon that account, the said *Richard* was then and there found to be in arrear and indebted to the said *John*, in other 50*l.* of like lawful money; and being so found in arrear and indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Oxford* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last mentioned sum of money, when he should be thereto afterwards requested: *Yet* the said *Richard* (altho' often requested, &c.) hath not yet paid the said

Money paid,
money lent, and
money had and
received, in one
count.

*Interest computed
assess.*

Declarations in Assumpsit.

said several sums of money, or any part thereof, to the said *John*, but he to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 60*l.*, and therefore he brings his suit, &c.

Notes.

In assumpsit the plaintiff may declare for work and labor generally, without setting forth *what manner of work and labor*. *Carth. 276. Vent. 44*; and the only reason why plaintiff is to shew defendant indebted is, that it may appear to the court, that it is not a *debt on record or specialty*, but only upon simple contract; and any *general words*, by which that may be made to appear, are sufficient. For damages in an assumpsit will be no bar to an action of debt, grounded on a record or specialty. *Cro. Jac. 6. Leon. 155. Cro. Eliz. 242.*

If the plaintiff declares on a special agreement, and fails in proving it, he may go into evidence on the general counts,

In an action where the plaintiff declared on a special agreement, and also on a general indebitatus assumpsit, the plaintiff failed to prove his special count; and it was objected, that he ought not to be allowed to enter into proof of the general count: but Lord Mansfield, suffered him to go into such proof: and afterwards his lordship considered of this case, and his opinion was, that where the evidence is sufficient to warrant the plaintiff's action on the general count, supposing no special agreement had been laid in the declaration, the plaintiff should be permitted to recover on such general count, tho' there be a special agreement laid, whether he attempt to prove such special agreement or not. *Mr. J. Wilmot* concurred. *Harris v. Oke. Buller, N. P. 137. vide Dougl. 651. Payne v. Bacomb*, wherein the above determination was confirmed.

Declaration for work and labor done, and materials found, goods sold and delivered, money laid out, and an infi-

Middlesex, to wit. *Richard Fenn*, late of *Westminster*, in the said county, yeoman, and *William Roe*, late of the same place, yeoman, were attached to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John*, by *Simon Lee*, his

his attorney, complains, *For that whereas, the said Richard and William, on the 6th day of October, in the year of our Lord 1794, to wit, at Westminster, in the said county, were indebted to the said John, in 100l. of lawful money of Great Britain, for the work and labor, care and diligence of the said John, by him the said John, before that time, done, performed, and bestowed, in and about the business of the said Richard and William, and for the said Richard and William, and at their special instance and request, (a) and for divers materials and other necessary things by the said John, before that time, found, provided, used, and applied, in and about the said work, at the like request of the said Richard and William, and being so indebted, they the said Richard and William, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, undertook, and then and there faithfully promised the said John, to pay him the said last-mentioned sum of money, when they should be thereto afterwards requested: And whereas, the said Richard and William, afterwards, to wit, on the same day and year aforesaid, at Westminster aforesaid, in consideration that the said Richard and William, at the like request of the said John, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said Richard and William, and for the said Richard and William, and at their like request; and had also found, provided, used, and applied, divers other materials, and other necessary things, in and about the said work, at the like request of the said Richard and William, they the said Richard and William then and there undertook, and faithfully promised the said John, to pay him so much money as he therefore reasonably deserved to have, when they the said Richard and William should be thereto afterwards requested; and the said John avers, that he therefore reason-*

(a) In a declaration for work done, and materials found, there does not need any counts for work done generally, nor for goods sold and delivered; unless the cloth was not employed in the business.

Declarations in Assumpsit.

Indebitatus assumpsit for goods sold and delivered.

If in case the goods are supplied and *not worked up*, these counts are necessary to be added; but not otherwise.

Quantum meruit thereon.

Indebitatus assumpsit for money paid.

ably deserved to have of the said *Richard* and *William* other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* and *William*, afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard* and *William*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for divers goods, wares, and merchandizes, by the said *John*, before that time, sold and delivered to the said *Richard* and *William* at their request; and being so indebted, they the said *Richard* and *William*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when they should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard* and *William*, had before that time sold and delivered to the said *Richard* and *William* divers other goods, wares, and merchandizes, they the said *Richard* and *William* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* and *William* other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* and *William*, afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard* and *William*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for money by the said *John* before that time *laid out, expended, and paid* for the said *Richard* and *William*, and at their like request; and being so indebted, they the said *Richard* and *William*, in consideration thereof, afterwards,

wards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said last mentioned sum of money, when they should be thereto afterwards requested: *And whereas* the *Infant* *compun-* said *Richard* and *William*, afterwards, to wit, on the *last* *dit.* same day and year aforesaid, at *Westminster* aforesaid, accounted together with the said *John*, of and concerning divers other sums of money, before that time due and owing, from the said *Richard* and *William* to the said *John*, and then being in arrear and unpaid, and upon that account, the said *Richard* and *William* were then and there found in arrear and indebted to the said *John* in other 100*l.* of like lawful money; and being so found in arrear and indebted to the said *John*, they the said *Richard* and *William*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when they should be thereto afterwards requested: *Yet* (a) the *Breach.* said *Richard* and *William* (altho' often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but they or either of them, to pay the same, or any part thereof, to the said *John*, have, and each of them hath, hitherto wholly refused, and still refuse, to the said *John* his damage of 100*l.*, and therefore he brings his suit, &c.

The pleaders in general specify the work done by the plaintiff, *as a taylor, &c.* It is laid down, that there is no necessity to state what sort or manner of work and labor it was. *Carth. 276. Vent. 44.*

(a) If a taylor colludes with a young man, and furnishes him with clothes to an extravagant degree; such tradesman shall not be allowed to recover, altho' the father might have been liable to a reasonable extent. *Simpson v. Roberson, Sitt. E. 1793.*

Declarations in Assumpsit.

A taylor may
retain.

If a taylor hath cloth delivered to him to make up into a garment, which he doth, he shall have an action for his work, *without delivering the garment*; and if the taylor refuse to deliver the garment upon request, it ought to be shewn *on the other side*, in excuse of the action; for the taylor's action is founded *upon the promise*, and if he hath done the work, and is ready to deliver the garment, he hath performed all that the law requires on his part, and on that consideration, is entitled to the benefit of the defendant's promise. *Palm. 223. Cro. Gar. 271.*

Declaration for
work and labor
of plaintiff,
with his horses,
carts, and car-
riages.

Oxfordshire, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas* the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *Witney* in the said county, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for the work, and labor, care, and diligence of the said *John*, by him the said *John* and his servants, and with his horses, carts, and carriages, before that time done, performed and bestowed, in and about the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time, by himself and his servants, and with his horses, carts, and carriages, done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard*, then and

Quantum me-
ruit thereon.

and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have of the said *Richard*, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *Witney* aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards, to wit, on the day and year aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the said county, was indebted to the said *John* in other 100*l.* of like lawful money, for the work and labor, care and diligence of the said *John*, by him the said *John* before that time done, performed, and bestowed, in and about the business of the said *Richard*, and for the said *Richard*, and at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *Witney* aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and

Indebitatus assumpsit for work and labor generally.

No necessity for these two counts, unless there be work without the *barres*, &c.

No occasion to specify the plaintiff's trade. *Carth. 276.*

Quantum meruit.

Indebitatus assumpsit, for money paid,

In simul computasset.

Breach.

year aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for money by the said *John*, before that time, laid out, expended, and paid for the said *Richard*, and at his request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, accounted together with the said *John*, of and concerning divers other sums of money, before that time due and owing from the said *Richard* to the said *John*, and then being in arrear and unpaid, and upon that account, the said *Richard* was then and there found in arrear and indebted to the said *John* in other 100*l.* of like lawful money, and being so found in arrear and indebted to the said *John*, he the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *Witney* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money last-mentioned, when he should be thereto afterwards requested: *Yet* the said *Richard*, (altho' often requested; &c.,) hath not yet paid the said several sums of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 160*l.*, and therefore he brings his suit, &c. *Pledges, &c.*

In these kind of actions the proof required is, the work done and materials found by the order or direction of defendant, and the value of the work; if there be a delivery of the work, prove that also.

Middleton

Middlesex, to wit. *John Denn* complains of Work and labor
Richard Fenn, being in the custody of the marshal, as a school-mas-
of the marshalsea, of our lord the now king, before ter.
the king himself, For that whereas the said *Richard*, These are the
on the 6th day of *October*, in the year of our Lord usual counts
1794, to wit, at *Westminster* in the said county, drawn by plead-
was indebted to the said *John* in 100*l.* of lawful ers.
money of *Great Britain*, for the work and labor, care
and diligence of the said *John* as a school-master,
by him the said *John* before that time done, per-
formed, and bestowed, in and about the teaching
and instructing of one *Joseph Denn*, the infant son
of the said *Richard*, in reading, writing, and good
manners, and other necessary accomplishments and
qualifications, for a long time, then elapsed, and The time need
at the special instance and request of the said *Ri-* not be specified
chard; and being so indebted, he the said *Richard*,
in consideration thereof, afterwards, to wit, on the
same day and year aforeaid, at *Westminster* afore-
said, undertook, and then and there faithfully pro-
mised the said *John*, to pay him the said sum of
money, when he should be thereto afterwards re-
quested: And whereas, afterwards, to wit, on the *Quantum meruit*
same day and year aforeaid, at *Westminster* afore- thereon.
said, in consideration that the said *John*, at the like
request of the said *Richard*, had before that time
done, performed, and bestowed, other his work
and labor, care and diligence, as a school-master,
in and about the teaching and instructing the said
Joseph Denn, the infant son of the said *John*, in
reading, writing, and good manners, and other
necessary accomplishments and qualifications, for
a long time, then elapsed, he the said *Richard*
then and there undertook, and then and there faith-
fully promised the said *John*, to pay him so much
money as he therefore reasonably deserved to have,
when he should be thereto afterwards requested;
and the said *John* avers, that he therefore reasona-
bly deserved to have of the said *Richard*, other
100*l.* of like lawful money, to wit, at *Westmin-*
ster aforeaid, whereof the said *Richard*, afterwards,

Declarations in Assumpsit.

*Indebitatus
assumpsit*, for
meat, drink,
books, &c.
found,

Quantum meruit
thereon.

Money laid out.

to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for meat, drink, washing, lodging, books, and other necessary things, by the said *John*, before that time, found and provided for the said *Joseph Fenn*, the infant son of the said *Richard*, and at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be there-
to afterwards requested. *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time found and provided for the said *Joseph Fenn*, the infant son of the said *Richard*. other meat, drink, washing, lodging, books, and other necessary things, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for money by the said *John*, before that time, laid out, expended, and paid for the said *Richard*, and at his request; and being so indebted, he the said *Richard* in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then
and

and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: (Some pleaders add an *in simul computasset*, but unless the account has been stated and settled, and proof can be given of it, it need not be added :) Yet the *Breach*. said *Richard*, (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof to the said *John*, but he to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 200*l.* and therefore he brings his suit, &c. Pledges, &c.

Surry, to wit. *Richard Fenn*, late of *Guildford*, ^{For work and labor as a school-mistress.} in the said county, yeoman, was attached to answer *Elizabeth Denn*, in a plea of trespass on the case, &c., and whereupon the said *John* by *J. B.* his attorney, complains, *For that whereas*, the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *Guildford*, in the said county, was indebted to the said *Elizabeth* in 60*l.* of lawful money of *Great Britain*, for the work and labor, care, diligence, and attendance of the said *Elizabeth* as a school-mistress, by the said *Elizabeth*, before that time, done, performed, and bestowed, in and about the teaching and instructing of *Ann Fenn*, the infant daughter of the said *Richard*, in reading, needle-work, good manners, and other necessary accomplishments and qualifications, for a long time before then elapsed, at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Guildford* aforesaid, undertook, and faithfully promised the said *Elizabeth*, to pay her the said sum of money, when he should be thereto afterwards requested: *And whereas*, after-^{Quantum meruit.} wards, to wit, on the same day and year aforesaid, at *Guildford* aforesaid, in consideration that the said *Elizabeth*, at the like request of the said *Richard*, had before that time done, performed, and

Declarations in Assumpsit.

and bestowed, other her work and labor, care, diligence, and attendance, *as a school-mistress*, in and about the teaching and instructing of the said *Ann*, the infant daughter of the said *Richard*, in reading, needle-work, good manners, and other necessary qualifications, for a long time before then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *Elizabeth*, to pay her so much money as she therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *Elizabeth* avers, that she therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Guildford* aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: Add *indebitatus assumpsit*, and *quantum meruit*, for meat, drink, books, &c. found, *as in the last precedent*, with the other counts.

Proofs,

The proof in these actions will be: 1. That the infant was put to school by the defendant. 2. The usual sum paid by children at plaintiff's school, and the time the infant was there, during which time he was educated and maintained. 3. The books found, and the price paid, with the usual allowance of pocket-money.

I take the law to be, that if the infant's father, &c. send him to school, and he receives education, if the father do not pay, the infant is not liable; because the master or mistress contract with the father for the education, and not the infant; therefore it may be said in this case, that the infant is *sub potestate parentis*, vide 2 *Black. Rep.* 1325.

But it would be otherwise, if the infant put himself to school, in this case, he will be bound. *Cro. Jac.* 494. 1 *Str.* 690. For the law says he may bind himself to pay for his necessary meat, drink, apparel, physick, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards. *Co. Lit.* 172.

An

An infant who lives with, and is properly maintained by her parent, cannot bind herself to a stranger for necessaries. *Bainbridge v. Pickering*, 2 Black. Rep. 1326.

Middlesex; to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas* the said *Richard*, on the 10th day of *October*, in the year of our Lord 1794, at *Westminster* in the said county, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for a certain stipend, salary, and allowance, before that time due and payable from the said *Richard* to the said *John*, for and in respect of the service of the said *John*, done and performed, as the interpreter of foreign languages, to wit, the *Chinese*, and other languages, to the said *Richard*; and in and about the accompanying the said *Richard* on a certain voyage and journey, to places beyond the seas, and giving his time and attendance to the said *Richard* as such interpreter as aforesaid, for a long time, to wit, for the space of nine months, before then elapsed, and upon the retainer, and at the special instance and request of the said *Richard*, and for certain work and labor, and divers other voyages and journies, done and performed by the said *John* for the said *Richard*, at the like request of the said *John*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested; And whereas the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time served as interpreter of certain foreign languages, to wit, the *Chinese*, and other languages, to the said *Richard*, and had accompanied the said *Richard* on certain voyages and journies to places

Declaration for the salary or wages of an interpreter of foreign languages, to a gentleman.

The time need not be stated, unless known.

Quantum meruit.

Declarations in Assumpsit.

Not material.

places beyond the seas, and during such his accompanying the said *Richard* had given his time and attendance to the said *Richard* as such interpreter as aforesaid, for a long space of time (*to wit, for the space of nine months*) before then elapsed; upon the retainer, and at the special instance and request of the said *Richard*; and had, at the like request of the said *Richard*, performed divers other journeys and voyages, and done and performed other work and labor for the said *Richard* as the servant of the said *Richard*, at his like request, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money; to wit, at *Westminster* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: Add a count for money expended and paid, money lent, and an *insimul computasset* (if necessary) with the common conclusion. As the two first counts are formed, there is no necessity to add two counts for work and labor generally.

For work and labor by plaintiff as undertakers in the C. P.

London, to wit. *Richard Roe*, late of *London*, yeoman, was attached to answer *John Denn* and *Thomas Denn* in a plea of trespass on the case, and whereupon the said *John* and *Thomas*, by *John Sill* their attorney, complain, *For that whereas*, the said *Richard*, on the 8th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* and *Thomas* in 100*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John* and *Richard* as undertakers of funerals, before that time done, performed, and bestowed by the said *John* and *Richard* and their servants, and with their horses, coaches, and other carriages, in and about the funeral of one *John Matthews*, on the retainer of

of the said *Richard*, and at his special instance and request, and for divers materials, and other necessary things by the said *John* and *Thomas* before that time found, provided, used and applied, in and about the furnishing and conducting the funeral aforesaid, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John* and *Thomas*, to pay them the said sum of money, when he should be thereto afterwards requested: *And whereas Quantum meruit.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John* and *Thomas*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other their work and labor, care and diligence, as undertakers of funerals, by themselves and their servants, and with their horses, coaches, and other carriages, in and about the funeral of the said *John Matthews*; and also, at the like request of the said *Richard*, had before then found and provided, used and applied, divers other materials, and other necessary things, in and about the furnishing and conducting of the said last-mentioned funeral, he the said *Richard* then and there undertook, and faithfully promised the said *John* and *Thomas*, to pay them so much money as they therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* and *Thomas* aver, that they therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas,* the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* *Indebitatus assumpsit* for the use and hire of goods employed in the funeral.

Declarations in Assumpsit.

Not material.

places beyond the seas, and during such his accompanying the said *Richard* had given his time and attendance to the said *Richard* as such interpreter as aforesaid, for a long space of time (*to wit, for the space of nine months*) before then elapsed; upon the retainer, and at the special instance and request of the said *Richard*; and had, at the like request of the said *Richard*, performed divers other journeys and voyages, and done and performed other work and labor for the said *Richard* as the servant of the said *Richard*, at his like request, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money; to wit, at *Westminster* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: Add a count for money expended and paid, money lent, and an *in simul computasset* (if necessary) with the common conclusion. As the two first counts are formed, there is no necessity to add two counts for work and labor generally.

For work and labor by plaintiff as undertakers in the C. P.

London, to wit. *Richard Roe*, late of *London*, yeoman, was attached to answer *John Denn* and *Thomas Denn* in a plea of trespass on the case, and whereupon the said *John* and *Thomas*, by *John Sill* their attorney, complain, *For that whereas*, the said *Richard*, on the 8th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Chap*, was indebted to the said *John* and *Thomas* in 100*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John* and *Richard* as undertakers of funerals, before that time done, performed, and bestowed by the said *John* and *Richard* and their servants, and with their horses, coaches, and other carriages, in and about the funeral of one *John Matthews*, on the retainer of

of the said *Richard*, and at his special instance and request, and for divers materials, and other necessary things by the said *John* and *Thomas* before that time found, provided, used and applied, in and about the furnishing and conducting the funeral aforesaid, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John* and *Thomas*, to pay them the said sum of money, when he should be thereto afterwards requested: *And whereas Quantum meruit.* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John* and *Thomas*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other their work and labor, care and diligence, as undertakers of funerals, by themselves and their servants, and with their horses, coaches, and other carriages, in and about the funeral of the said *John Matthews*; and also, at the like request of the said *Richard*, had before then found and provided, used and applied, divers other materials, and other necessary things, in and about the furnishing and conducting of the said last-mentioned funeral, he the said *Richard* then and there undertook, and faithfully promised the said *John* and *Thomas*, to pay them so much money as they therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* and *Thomas* aver, that they therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the *Indebitatus assumpsit* aforesaid *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* *sumpsit* for the use and hire of goods employed in the funeral. and

Declarations in Assumpsit.

and *Thomas* in other 100*l.* of like lawful money, for the use and hire of divers goods and chattels of the said *John* and *Thomas*, to be used and employed in and about the business of the said *Richard*, and at his special instance and request, and by the said *John* and *Thomas* before that time, let to hire to the said *Richard*, at his like request; and the said *Richard*, according to that letting to hire, had and used, for a long time then elapsed; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John* and *Thomas*, to pay them the said last-mentioned sum of money, when he should be thereto afterwards requested:

*Quantum meruit
thereon.*

And whereas, afterwards, to wit, on the same day year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John* and *Thomas* had, before that time, at the like special instance and request of the said *Richard*, let to hire to the said *Richard* divers other goods and chattels of the said *John* and *Thomas*, to be used and employed in and about the business of the said *Richard*; and that the said *Richard*, according to that letting to hire, had and used the same, for a long time before then elapsed, he the said *Richard* then and there undertook, and faithfully promised the said *John* and *Thomas*, to pay them so much money, as they therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* and *Thomas* aver, that they therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* and *Thomas* in other 100*l.* of like lawful money, for divers goods, wares, and merchandizes, by the said *John* and

*Indebitatus as-
sumpsit for goods
sold and deliver-
ed.*

and *Thomas*, before that time, sold and delivered to the said *Richard*, and at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John* and *Thomas*, to pay them the said sum of money last mentioned, when he should be thereto afterwards requested: *And whereas*, af- *Quantum meritis.*
 afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John* and *Thomas*, at the like request of the said *Richard*, had, before that time, sold and delivered to the said *Richard*, divers other goods, wares, and merchandizes, he the said *Richard* undertook, and there faithfully promised the said *John* and *Thomas*, to pay them so much money, as they therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* and *Thomas* aver, that they therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And Money paid,*
whereas, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* and *Thomas* in other 100*l.* of like lawful money, for money by the said *John* and *Thomas* before that time laid out, expended, and paid for the said *Richard*, and at his request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John* and *Thomas*, to pay them the said last-mentioned sum of money, when he should be thereto afterwards requested [if necessary, add an *insimul computasset*]; Yet the Conclusion.
 said

Declarations in Assumpsit.

said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John* and *Thomas*, or to either of them; but to pay the same, or any part thereof, to them, or either of them, hath hitherto wholly refused, and still refuses, to the said *John* and *Thomas* their damage of 100*l.*, and therefore they bring their suit, &c.

For a surgeon's bill.

London, to wit. *John* Denn complains of *Richard* Fenn, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* (a) in 100*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John* as a surgeon, at the special instance and request of the said *Richard*, in and about the healing and curing of the said *Richard* (b), (and one *Sarah* Fenn his wife, and divers other persons of the family of the said *Richard*) of divers bruises, wounds, diseases, and maladies, under which the said *Richard* (and his said wife, and the said other persons of his family) had before that time labored and languished, and for divers medicines, medicinal potions, plaisters, and other necessary things, before that time found and provided, administered, delivered, and applied by the said *John*, in and about that particular, at the like request of the said *Richard*; and also for divers journies and attendances before that time performed and made, by the said *John* for the said *Richard*, at his like request; and being so indebted, he the said *Richard*, in consideration

(a) Some pleaders state in both counts, *be; the said John, then and for a long time then last past, being a surgeon, and the possessor of a surgeon for all the time aforesaid, using and exercising.* But I do not see it necessary. As this precedent is framed, it will serve for curing husband, wife, or any of the family; but it must be laid at the request of the husband.

(b) If for cure of the wife as well, or any of the family. thereof,

thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, *as a surgeon*, in and about the healing and curing of the said *Richard* (a) (*and the said Sarah his wife, and divers other persons of his family*) of divers other bruises, wounds, diseases, and maladies, under which the said *Richard* (*and his said wife, and the said last-mentioned other persons of his family*) had, before that time, labored and languished, and had before that time, at the like request of the said *Richard*, found and provided, administered, delivered, and applied divers other medicines, medicinal potions, plaisters, and other necessary things in and about that particular; and had also before that time, at the like request of the said *Richard*, performed and made divers other journies and attendances for the said *Richard*; he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Some pleaders add two counts for goods sold and delivered to the defendant only, but I see no reason for it. Add money paid, *and, if necessary, an infirmul computasset, with the common conclusion, which will be sufficient.*

(a) If for the cure of *the wife as well, or any of the family.*

Q

London,

Declarations in Assumpsit.

For a man mid-
wife for delivery
of a child.

One M. 3.

Quantum meruit.

One M. 3.

London, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that whereas the said *Richard*, on the 6th day of *January*, in the year of our Lord 1794, at *London* aforesaid, in the parish of *St. Mary-le-Bow* in the ward of *Cheap*, was indebted to the said *John*, in the sum of 60*l*. of lawful money of *Great Britain*. for the work and labor, care, diligence, and attendance of the said *John*, by him the said *John* before that time done, performed, and bestowed, as a man midwife, in and about the delivery of one *Mary Fenn*, the wife of the said *Richard*, of a certain child, wherewith she, the said *Mary Fenn*, was then big and en-
sient, at the special instance and request of the said *Richard*; and for divers medicines, medicinal potions, plaisters, and other necessary things, by the said *John* before that time found, provided, administered, delivered, and applied, in and about that particular, at the like request of the said *Richard*; and being so indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care, diligence, and attendance, as a man-midwife, in and about the delivering of the said *Mary Fenn*, the wife of the said *Richard*, of a certain other child, wherewith she, the said *Mary*, was big and ensient; and had before that time, at the like request of the said *Richard*, found and provided, administered, delivered, and applied, divers other medicines, medicinal potions, plaisters, and other necessary things, in and about that particular, he, the said *Richard*, then and there undertook,

took, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice. Add a count for money paid (and, if necessary, an *in simul computassit*), with common conclusion.

The proof will be—That plaintiff practises the *Proof*. art of man-midwifery. 2. The delivery of the defendant's wife. 3. The usual fee paid for delivery. 4. The medicines delivered, and that the bill is reasonable; and lastly, that she is the wife of defendant by *reputation*, &c. or that the defendant said she was his wife. Proof of an actual marriage is not necessary.

If it be a delivery of any *other woman* than the wife, the count should state, "*The delivery of one M. S. of a certain child, &c. at the special instance and request of defendant,*" and that he undertook and promised payment.

Hampshire, to wit. *John Denn* complains of *For work done Richard Fenn*, being in the custody of the marshal, ^{as an apothecary.} of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 6th day of *January*, in the year of our Lord 1794, to wit, at *Fareham* in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for (a) the work and labor, care and diligence, of the said *John* as an *apothecary*, by him the said *John* before that time done, performed, and bestowed, in and about the healing and curing of the said *Richard* (and divers other persons of the family of the said *Richard*)

(a) This action lies for medicines provided and delivered for an *infant daughter* against the father. *R. Ray* 67. But the declaration must state for physic provided and delivered for the daughter, at request of the father, and not to the daughter. *Keb.* 439.

Declarations in Assumpsit.

of divers diseases and maladies, under which they had labored and languished, and at his special instance and request, and for divers medicines, medicinal potions, plaisters, and other necessary things before that time found and provided, administered, delivered, and applied, by the said *John*, in and about that particular, at the like request of the said *Richard*; and being so indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Fareham* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *Richard*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Fareham* aforesaid, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, *as an apothecary*, in and about the healing and curing of the said *Richard* (a) *(and divers other persons of the family of the said Richard)* of divers diseases and maladies under which they had labored and languished; and had also, at the like request of the said *Richard*, before that time found, provided, administered, delivered, and applied, divers other medicines, medicinal potions, plaisters, and other necessary things, in and about that last mentioned particular, he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *Fareham* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money laid out; and if the ac-

(a) If the fact be so.

count has been *stated and settled*, an *infimul computasset* is necessary, and common conclusion.

N. B. An apothecary cannot recover for *journies or attendance*, because his *profit arises on the medicines delivered*; but he may recover the usual fees for bleeding.

In this case you prove plaintiff an apothecary only, the delivery of the medicines charged in the bill, and that the charges are reasonable. I have known a general proof of the delivery of medicines sufficient, without proof of every *particular bottle*, that being almost impossible.

London, to wit. *Richard Fenn*, late of *London*, ^{For work and labor of the plaintiff's wife,} esquire, was attached to answer *John Denn* in a plea of trespass on the case; and whereupon the said *John*, by *John Keen*, his attorney, complains, ^{as a midwife in} *C. P.*

For that whereas, the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence of *Ann*, the wife of the said *John*, as a *midwife*, before that time done, performed, and bestowed by the said *Ann*, for *Elizabeth* the wife of the said *Richard*, and at the special instance and request of the said *Richard*; and being so indebted, he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him the said sum of money when he should be thereto afterwards requested: *And whereas*, after- ^{*Quantum meruit* thereon.} wards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *Ann*, at the like special instance and request of the said *Richard*, had, before that time, done, performed, and bestowed, other her work and labor, care and diligence, as a *midwife*, for the said *Elizabeth*, the wife of the said *Richard*, he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money

Declarations in *Assumpsit*.

*Indebitatus
assumpsit* for
work and labor
by plaintiff and
his servants.

The wife, in the
eye of the law,
is, in this re-
spect, the ser-
vant of the
husband.

Quantum meruit.

as the said *Ann* therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that the said *Ann* therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* in other 100*l.* of like lawful money, for the work and labor, care and diligence of the said *John*, by him the said *John*, and his servants, before that time done, performed, and bestowed, in and about the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he, the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested.

Quantum meruit. *And whereas* the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, by himself and his servants, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he, the said *Richard*, should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London*

don aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice; (add a count for money paid): Yet the said *Richard Broach*. (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*. But to pay the same, or any part thereof, to the said *John*, the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John* his damage of 200*l.*; and therefore he brings his suit, &c.

Notes.

It is laid down, that *whatever the wife earns during coverture* belongs to the husband, and he shall bring an action for it *in his own name*. And it was held on demurrer, in an action by husband and wife, for work done *by the wife*, that the action ought to have been brought *by the husband alone*, for, it being a general *indebitatus assumpsit*, no promise can be supposed to have been made to the wife; and as the wife's debts would fall against the husband's estate, so the profits of her labor shall go to him, or his executor. *Salk 114. Buckley v. Collier*. But where there is an *express promise to the wife*, the husband may assent to make it a joint contract, and then she may join. *2 Black. Rep. 1239. Cro. Eliz. 61. Pratt and wife v. Taylor*.

It is clearly agreed, that for debts *due to the wife*, and all causes of action *before coverture*, the husband must join with her in the action. *Roll. Abr. 347. Sid. 299*. And he is answerable for all actions, which his wife stood attached, at the time of the coverture; in which cases, the action must be against them *both*. *Co. Lit. 133*.

In all actions of assumpsit, wherein the husband and wife join, *the interest of the wife must be stated*; for otherwise, as the wife can make no contract, and the husband has the benefit of all made by

Declarations in Assumpsit,

her, the *assumpsit* shall be deemed to be only to the husband, unless her interest appears *specially*. As where she has a *separate property*. So if the cause of action existed *before her marriage*. 2 *Black. Rep.* 1236. *Bidgood v. Way & ux.* So if a promise is made to pay her 10*l.* for the cure of a wound. It was held, that the cause of action arising from her labor and skill, and the promise being made to her, she and her husband may join. *Cro. Jac.* 205. *Brasford v. Buckingham.* Vide 1 *Str.* 80. *Salk.* 118.

As an extraordinary fee in this case is due to the plaintiff's wife for the practice of a midwife, his proof should be, 1. That she exercises that profession. 2. The fee usually paid on such occasion; and 3. The delivery of, and attendance on, the defendant's wife. 4. That she is the wife, by reputation or acknowledgment of defendant, will do.

The husband and wife but one person. He receives the profits of her real estate.

From the time of the intermarriage, the law looks upon the husband and wife but as one person, and therefore allows of but one will between them, which is placed in the husband, as the fittest and ablest to provide for and govern the family; and for this reason, the law gives the husband an absolute power of disposing of her property, no act of her's being of any force to affect or transfer that which, by the intermarriage, she has resigned to the husband. But the freehold and inheritance of the wife is subject to other rules and regulations; for the husband, by the marriage, does not become absolute proprietor of the inheritance, but, as the governor of the family, is so far master of it, as to receive the profits of it during her life, but has no power to make an absolute sale of it, without her consent. *Roll. Abr.* 347. 2 *Litt.* 510. 10 *Co.* 42.

Personal estate.

All the personal estate, as money, goods, chattels, household furniture, &c. that were the property, and in the possession of the wife, at the time of her marriage, are actually vested in the husband; so that of these, he may make any disposition in his life.

Declarations in Assumpsit.

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life-time, without her consent, or may by will devise them, and shall without any such disposition go to the executors or administrators of the husband, and not to the wife, tho' she survive him. *Co. Lit.* 351. *Doff. and Stud. Dia.* 1. c. 7. But choses in action, as debts by obligation, &c. which are to be demanded by action, tho' they are likewise so far vested in the husband that he may reduce them into possession, yet, if he dies before any alteration made by him, they shall go to his wife; nor shall they, with such alteration, survive to the husband upon the death of the wife, or he have any right to them, but as he is entitled as administrator to his wife. *Co. Lit.* 317. 3 *Mod.* 186. 1 *Roll. Abr.* 910.

In those cases where the debt, or cause of action, will survive to the wife, the husband and wife are regularly to join in the action, as in recovering debts due to the wife before marriage, in actions relating to her freehold or inheritance, or injuries done to the person of the wife. *Roll. Abr.* 347. *Moore* 432. Therefore the husband alone cannot bring an *indebitatus assumpsit*, or an *in simul computasset*, for a debt due to the wife herself before coverture, much less when it is due to her as executrix or administratrix. *Sid.* 299. *Owen* 82.

Middlesex, to wit. *Richard Fenn*, late of *West-* Declaration
minster in the said county, yeoman, and *Elizabeth* against husband
his wife, were attached to answer *John Denn* in a and wife for
plea of trespass on the case; and whereupon the work done for
said *John*, by *Simon Lucas* his attorney, complains, the wife, whilst
For that whereas, the said *Elizabeth*, whilst she was sole, by original.
sole, and before her intermarriage with the said
Richard, on the 11th day of *April*, in the year of
our Lord 1794, to wit, at *Westminster* in the said
county, was indebted to the said *John* in 60*l.* of
lawful money of *Great Britain*, for the work and
labor, care and diligence, of the said *John*, by
him the said *John* before that time, done, performed,
and bestowed, for the said *Elizabeth*, whilst she was
so sole as aforesaid, and at her special instance and
request;

request; and being so indebted, she, the said *Elizabeth*, whilst she was so sole as aforesaid, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when she should be thereto afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Elizabeth*, whilst she was so sole as aforesaid, had before that time, done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Elizabeth*, and for the said *Elizabeth*, she the said *Elizabeth*, undertook, and then and there faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when she should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Elizabeth*, whilst she was so sole as aforesaid, other 60*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Elizabeth* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Elizabeth*, whilst she was so sole as aforesaid, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 60*l.* of like lawful money, for money by the said *John* before that time laid out, expended, and paid, for the said *Elizabeth*, whilst she was so sole as aforesaid, and at her special instance and request, and for other money by the said *John* before that time lent and advanced to the said *Elizabeth*, whilst she was so sole as aforesaid, at her like request; and being so indebted, she the said *Elizabeth*, whilst she was sole as aforesaid, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the

Quantum meruit.

Indebitatus assumpsit for money paid, and for money lent.

the said last-mentioned sum of money, when he should be thereto afterwards requested: Yet the said *Elizabeth*, whilst she was sole, and the said *John* and *Elizabeth* since their intermarriage (altho' often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*. But the said *Elizabeth*, whilst she was so sole, and the said *John* and *Elizabeth* since their intermarriage, to pay the same, or any part thereof, to the said *John*, have, and each of them hath, hitherto wholly refused, and still refuse, to the said *John* his damage of 60*l*.; and therefore he brings his suit, &c.

Notes.

The husband is liable to the debts contracted by the wife *before marriage*, whether he had any portion with her or not; and this the law presumes reasonable, because, by the marriage, the husband acquires an absolute interest in the personal estate of the wife, and has the receipt of the rents and profits of her real estate during coverture; also whatever accrues to her by her labor, or otherwise, during the coverture, belongs to the husband; so that in favor of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. *Roll.*

Abr. 352. *3 Mod.* 186. But if the feme sole marries and dies, the husband shall not be charged; for they must be recovered in her life-time. *Roll.*

Abr. 351. If baron and feme be sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable, for the judgment has altered the debt. *Sid.* 337.

In all cases where the debt is contracted by the wife *whilst sole*, the action must be brought against the husband and wife; otherwise it might be a means of making the husband's property liable, without

Husband liable to all debts wife contracted before marriage;

but they must be recovered in her life-time, or, at least, suit must be commenced.

She must be joined in such suits.

without giving him an opportunity of defending himself. *Stitt* 254. 280. 2 *Rel. Rep.* 53.

Proof of marriage.

Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact, between two parties describing themselves by such and such names and places of abode, tho' it does not prove the identity. The action for criminal conversation is the only civil case, where it is necessary to prove an *actual* marriage. 4 *Burr.* 2057. So for bigamy. In other cases, cohabitation, reputation, &c. are equally sufficient since the marriage act as before. *Birt v. Barlow*, Lord Mansfield. *Dougl.* 174.

Marr. act 26
Gen. 2. c. 33.

Mr. Justice Buller says, Proof of the marriage may be either by a copy of the register of the church where the ceremony was performed, or by the testimony of one who was present at the ceremony, will be sufficient, *Bull. N. P.* 27.; but it is not necessary to prove a marriage according to the church of England. It is sufficient, if the party is of any religious sect, to prove a marriage according to the rites and ceremonies of that sect; as *Jews, Quakers, &c.* *Ibid.* 28. *Woolston v. Scott.*

If a copy from the register book be produced, it must be taken on plain paper without stamps, and an exact copy of the whole entry of the marriage must be taken, as also the names of the parties signing, as well as all the witnesses, and date of the year and month; and the witness must prove, that it is an exact copy taken from the register book of marriages of the parish of A. *Vide Dougl.* 170.

Proof by witnesses who saw the marriage is *prima facie* sufficient; and whoever would impeach it, must shew wherein it is irregular. *Bull.* 114. *Burr. Settlm. Cases* 506.

In *Birt v. Barlow*, *crim. con.* Evidence was, a copy of the register, with the names of parties, parson, and witnesses; and plaintiff's counsel said, in the course of their evidence of the adulterous intercourse, it would come out, that plaintiff's

reputed wife was of the name and family of *Champneys*, and that they long cohabited together, and esteemed to be man and wife by all their friends and relations. The judge said, that identity of the parties must be proved, and nonsuited the plaintiff for want of that—Motion for a new trial; Lord *Mansfield*, There are marriages among particular sorts of dissenters, where the proof by a register would be impossible; and *J. Denison*, in a case of that kind which came before him, admitted other proof of an actual marriage. But as to the proof of identity, whatever is sufficient to satisfy a jury is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity; but it may be proved in a thousand other ways. Suppose the bell-ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; suppose the hand-writing of the parties were proved; suppose persons called who were present at the wedding dinner. *Dougl. 174. Rule abs.*

The copy of register was Harriot Champneys.

Proof of actual marriage.

This cause was tried again, and verdict for the plaintiff.

Chief *J. De Grey* refused to admit, in an action *Fleet register for crim. con.* the Fleet register in 1737 as a confirmation of the testimony of the witness who was present at the marriage solemnized in the Fleet, saying, that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit. *Howard v. Burtonwood, Sitt. Westm. 1776. Espineau. 343.* The register or books at *May Fair* chapel was refused, the parson being transported, and the clerk dead. *4 Burr. 2057. Morris v. Miller.*

May Fair

In *Birt v. Barlow*, Mr. *Dunning* said, In an action for goods furnished to a wife, evidence of cohabitation and reputation is sufficient. *Dougl. 172.*

In *Morris v. Miller* for crim. con. plaintiff proved articles, between him and wife after marriage, for settling wife's estate. Cohabitation, name,

name, and reception of her by every body as his wife, but not by the register, or by witnesses who were present at the marriage, held insufficient.

4 Burr. 2057.

Marriage act.

If any person solemnize matrimony in any other place than a church or public chapel (except by special licence from the archbishop of *Canterbury*), or without publication of banns, or licence in a church or chapel, the marriage shall be void. 26 Geo. 2. c. 33.

All marriages solemnized by licence, where either of the parties (not being a *widow* or *widower*) is under 21, which shall be had without the consent of parents and guardians, shall be absolutely void. *Ibid.*

This act does not extend to marriages in *Scotland* or foreign parts, nor to any marriages among any sectaries, as *Quakers*, *Jews*, &c. whose marriages are good if solemnized according to their own rites, and both parties are of the same persuasion, *Bull.* 113; nor to marriages in *Scotland* under age. *Ibid.* 114.

Two witnesses to be present.

All marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister, and shall be entered in the register, and to be signed and attested by two witnesses. 26 Geo. 2. c. 33.

These clauses are of infinite utility to the kingdom. They were meant as well to prevent false entries, as to guard against illegal marriages, without licence or publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But besides facilitating and ascertaining the evidence of marriages, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquiries *post mortem* have been disused, that it is easier to establish one for 500 years back, before the time of *Charles* the 2d, than for 100 years since his reign. But this advantage

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vantage would be lost, and it would be very prejudicial, if the act were so construed as to render the proof of marriages more difficult than formerly. I take it that the law stands as it did before in that respect. *Lord M. Dougl.* 174. *Birt v. Barlow.*

If a man cohabits with a woman, allows her to assume his name, and passes her to the world for his wife, tho' in fact he is not married to her; yet he is liable to her contract for necessaries. *Per Lord* *Sir. Hil. 26 Geo.*
Man. field. *Hudjon v. Brent.* *Norwood v. Steven-* *III.*
son, Bull. 126. *Ne u-que accouple* in loyal matrimonic, is a bad plea in case, for the debt of a wife.

London, to wit. *John Denn* and *Ann* his wife *For husband and*
complain of *Richard Finn*, being in the custody of *wife, for a debt*
the marshal of the marshalsea of our lord the now *due to the wife*
king, before the king himself, *For that whereas* *whilst sole,*
the said *Richard*, on the 22d day of *February*, in *for goods sold,*
the year of our Lord 1794, to wit, at *London* afore- *&c.*
said, in the parish of *Saint Mary-le-Bow*, in the
ward of *Cheap*, was indebted to the said *Ann*, the
wife of the said *John*, whilst she was sole, and before
her intermarriage with the said *John* (a), in 500l.
of lawful money of *Great Britain*, for divers goods,
wares, and merchandizes, by the said *Ann*, whilst
she was so sole, before that time, sold and delivered
to the said *Richard*, and at his special instance and
request; and being so indebted, he the said *Richard*,
in consideration thereof, afterwards, to wit, on the
same day and year aforesaid, at *London* aforesaid,
in the parish and ward aforesaid, undertook, and
faithfully promised the said *Ann*, to pay her the said
sum of money, when he should be thereto af-
terwards requested: *And whereas*, afterwards, to *Quantum meruit.*
wit, on the same day and year aforesaid, at *London*
aforesaid, in the parish and ward aforesaid, in con-
sideration that the said *Ann*, whilst she was so sole,
at the like request of the said *John*, had before

(*) Where the husband and wife join in the action, the interest of the wife must be stated, as if the cause of action existed before her marriage. So where she has a separate property. *a Black. Rep.* 1236.

that

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that time sold and delivered to the said *Richard* divers other goods, wares, and merchandizes, he, the said *Richard*, undertook, and then and there faithfully promised the said *Ann*, whilst she was so sole, to pay her so much money as she therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* and *Ann* his wife aver, that she the said *Ann*, therefore reasonably deserved to have of the said *Richard* other 500*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Ann*, whilst she was so sole, in other 500*l.* of like lawful money, for money by the said *Ann*, whilst she was so sole as aforesaid, before that time laid out, expended, and paid for the said *Richard*, at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *Ann*, whilst she was so sole, to pay her the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas* the said *Richard*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *Ann*, whilst she was so sole, of and concerning divers other sums of money, before that time due and owing from the said *Richard* to the said *Ann*, whilst she was so sole, and then being in arrear and unpaid; and upon that account, the said *Richard* was then and there found in arrear and indebted to the said *Ann* in other 500*l.* of like lawful money, and being so found in arrear and indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c.

*Indebtedness of
sumptit for money paid.*

*Infimal compa-
saist.*

Yt

Yet the said *Richard*, (altho' often requested, &c.) Breach hath not yet paid the said several sums of money, or any part thereof, to the said *Ann* whilst she was so sole, or to the said *John* and *Ann* since their intermarriage, or to either of them; but he to pay the same, or any part thereof, to the said *Ann* whilst she was so sole, or to the said *John* and *Ann* since their intermarriage, or to either of them, hath hitherto wholly refused, and still refuses, to the said *John*, and *Ann* his wife, their damage of 60*l.* and therefore they bring their suit, &c. pledges, &c.

Where a woman marries a second husband, living the first, and the second not privy; as to what she acquired during the cohabitation, *Parker C. J.* said, he would esteem her as the servant to the second husband, who is entitled to the benefit of her labor. *Strutville v. —*, 1 *Str.* 80.

Baron and Feme:

Of Contracts for Necessaries, &c.

A husband is obliged to maintain his wife, and *11 H. 6. 30.* may by law be compelled to find her necessaries, as *M. 61.* meat, drink, cloaths, physick, &c. suitable to the husband's degree, estate, or circumstances; it is settled that the wife is not to be her own carver, and that she hath not an innate or absolute power of binding the husband by any contract of hers, tho' for necessaries, without his assent, precedent, or subsequent. The law therefore in these cases, which *1 Sid. 109.* seems established by usage and practice, is to leave it to the jury to find, whether the husband consented or not; and though no express consent or agreement of his be proved, yet if it appears, that she cohabited with her husband, and bought necessaries for herself, children, or family, the husband shall be chargeable, and the jury may find that they

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Salk. 119.

2 Str. 1214.

they came to the husband's use, he being by law obliged to provide for those; also, if she cohabits with her husband and is ever so lewd, he shall be liable for her necessaries, for he took her for better, for worse; so, if he runs away from her, or turns her away, or forces her by cruelty, or ill usage to go away from him; the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered. 1 Sid. 109. Salk. 116. 118. Lord Ray. 444. 2 Str. 875. 647. 706. 1 Mod. 128.

But where he prohibits persons to sell,

But where a woman *departs* from her husband without his consent, and during her absence the husband prohibits several persons, and among the rest J. S., to trust her, and after she makes a request to cohabit again with him, and he refuses to receive her, and yet J. S. sells to her silk and velvet to the value of 40*l.*, which is found by the jury suitable to the degree of her husband, he shall not be charged. 1 Sid. 109, 110. Mod. 128. Lev. 4, 5. Keb. 69, 80. Scott v. Manby.

In this case Lord Hale held, when a wife, during cohabitation, contracts for necessaries for herself, her family, her husband or her children, this is great evidence to a jury to make them find the assent of the husband: But when a wife leaves her husband without consent, he may refuse to supply her; nor can a tradesman supply her where there is an express prohibition.

When the wife contracts for the necessaries of her husband, children, or family, this shall not charge him by any inherent power in the wife, but by a reasonable and implicit assent, which must be found by a jury; but this consent must be either express or implied: Upon her departure, all evidence of any obligation of the husband to maintain her, ceases.

Since the resolution in the above cause, there have been several cases in which tradesmen have recovered in actions brought against the husband,
for

for goods delivered the wife, and the judges have laid down the distinction of an *implied promise*; and directed it as a sufficient foundation to charge the husband; and in their direction have shewn as much favor as possible to such tradesmen as entrusted her on the credit of her husband, and were in no combination with the wife to charge him.

If she takes up goods and pawns them before ^{Pawns} made into cloaths, he shall not pay for them. *Salk.* 118. So if she pawns her cloaths, and borrows money to redeem them. 2 *Strw.* 283. The warning a tradesman's servant to trust her is sufficient. 2 *Lord Ray.* 1006. If she elopes, tho' she be furnished with necessaries and tho' no notice be had, yet husband not liable. 1 *Stra.* 647. 706. *vide* 2 *Str.* 875. Nor can she, during the elopement, be charged for a carriage furnished. 2 *Black. Rep.* 1079. Nor can the husband be charged where the wife lives apart, and has a separate maintenance. 1 *Term Rep.* 5. 1 *Lord Ray.* 444. In this case, if it be publicly known in the *place* where the parties live, it is sufficient. *Salk.* 116. If the husband is an alien, enemy, or transported, in this case, the wife may be sued for her contracts. *Ch. Lit.* 132. b. *Salk.* 116. 1 *Lord Ray.* 147. So if she be a feme sole trader, by the custom of *London.* 2 *Black. Rep.* 1197.

Warwickshire, to wit. John Denn complains of Declaration against husband
Richard Fenn, being in the custody of the marshal, and wife for
of the marshal's fee, of our lord the now king, before money lent to
the king himself, of a plea of trespass on the case; the wife in his
For that whereas, the said Richard, on the 16th day absence;
of October, in the year of our Lord 1794, to wit,
at Warwick, in the said county, was indebted to
the said John in 50*l.* of lawful money of Great
Britain, for money by the said John before that
time lent to Ann, the wife of the said Richard,
(*a*) in his absence, and at the special instance and
request of the said Richard; and being so indebted,

(a) If the fact be so.

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Breach.

he the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *Warwick* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: Yet the said *Richard* (although often requested, &c.) hath not yet paid the said sum of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John* his damage of 50*l.*, and therefore he brings his suit, &c. pledges, &c.

Notes.

An *indebitatus assumpsit* for money lent to the wife at the request of the husband is a good count.

In the case of *Stephenson v. Hardy*, which was for money lent to defendant's wife, at his request, in the absence of her husband, it was proved, that he being about to set out upon a voyage to *Ireland*, desired the plaintiff to lend his wife money if she should have occasion for it, in his absence; the plaintiff accordingly did lend her a certain sum, for which this action was brought. Lord C. J. de Grey: If goods are delivered to the wife, at the instance and request of the husband, he is bound by a contract *express*; if a husband turns his wife out of doors unjustly, and she buys necessaries of life, he is bound to pay the same, by an *implied promise*; he is also bound by all her contracts for necessary goods during cohabitation, and although the goods be *actually* delivered to her, yet they are goods sold and delivered to him. It is admitted, that if the word *advanced* had been inserted in the count, instead of the word *lent*, it would have been good; I think (in this case) the word *lent*, is the same as the word *advanced*. I think a loan to the wife, at the request of the husband, is the same in law, as if the loan had been to the husband himself. *Blackstone, J.* A wife may make an *inchoate contract*, which the husband might afterwards confirm,

firm, or disaffirm, and that here he had (if the expression may be allowed) previously confirmed the contract for the loan. 3 *Wils.* 388. Judgment for plaintiff.

Yorkshire, to wit. John Denn complains of *Declaration*
Richard Fenn, being in the custody of the marshal, against the
of the marshal's fee, of our lord the now king, be- husband for
fore the king himself; For that whereas, the said meat, &c. found
Richard, on the 20th day of *March*, in the year of for the wife, and
our Lord 1794, to wit, at *Doncaster*, in the said and delivered.
county, was indebted to the said *John* in 6*ol.* of
lawful money of *Great Britain*, for meat, drink,
washing, lodging, and other necessaries, by the said
John, before that time, found and provided for *Ann*,
the wife of the said *Richard*, at the special instance
and request of the said *Richard*; and being so in-
debted, he the said *Richard*, in consideration there-
of, afterwards, to wit, on the day and year afore-
said, at *Doncaster* aforesaid, undertook, and faithfully
promised the said *John*, to pay him the said sum of
money, when he should be thereto afterwards re-
quested: And whereas, afterwards, to wit, on the *Quantum meruit.*
same day and year aforesaid, at *Doncaster* aforesaid,
in consideration that the said *John*, at the like re-
quest of the said *Richard*, had before that time
found and provided for the said *Ann*, the wife of
the said *Richard*, other meat, drink, washing, lodg-
ing, and other necessaries, he the said *Richard* then
and there undertook, and faithfully promised the
said *John*, to pay him so much money as he there-
fore reasonably deserved to have, when he the said
Richard should be thereto afterwards requested:
And the said *John* avers, that he therefore reason-
ably deserved to have of the said *Richard*, other
6*ol.* of like lawful money. to wit, at *Doncaster*
aforesaid, whereof the said *Richard* afterwards, to
wit, on the day and year aforesaid, there had no-
tice: And whereas, the said *Richard* afterwards, to *Indebitatus af-*
wit, on the same day and year aforesaid, at *Don-* *sumpsit* for goods
caster aforesaid, was indebted to the said *John* in sold and de-
other 6*ol.* of like lawful money, for divers goods, livered.
wares,

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wares, and merchandizes by the said *John*, before that time, sold and delivered to the said *Richard*, at his special instance and request; and being so indebted, (a) he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, undertook and faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard*, divers other goods, wares, and merchandizes, he the said *Richard* undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested: *And the said John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Doncaster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, was indebted to the said *John* in other 60*l.* of like lawful money, for money by the said *John* before that time advanced to the said *Ann*, the wife of the said *Richard*, at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *Yet the said Richard* (altho' often re-

Quantum meruit.

For money advanced to the wife.

Breach.

(a) The husband is bound by the wife's contracts for necessary goods during cohabitation, and altho' the goods be actually delivered to her, yet they are goods sold and delivered to him. *De Grey*, Ch. J. 3 Wils. 384.

quested,

quested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John*, the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 100*l.*, and therefore he brings his suit, &c. pledges, &c.

Notes.

In *assumpsit* for goods sold and delivered to the A husband who
defendant's wife, the case appeared to be, that the turns away his
defendant and his wife had formerly lodged at the wife without
plaintiff's house, and the plaintiff furnished her to provide for
with goods; and the defendant finding the plaintiff her, cannot
had helped her to pawn her watch, and suspecting make a particu-
lar prohibition.
he confederated with her, left the lodgings, after
paying the plaintiff his bill, and forbidding him ever
trusting her again. After this, the defendant and
his wife cohabited together for a year; when, with-
out any cause appearing, he left her, locked up her
cloaths, and upon her finding him out, he refused
to admit her, and struck her, and declared he would
not maintain her, or pay any body that did; in
this distress she borrowed cloaths of her friends,
and applied to the plaintiff, who furnished her with
necessaries, according to the defendant's degree;
which the defendant refusing to pay for, this ac-
tion was brought; and upon trial, found for the
plaintiff. On motion for a new trial, the court
held, the verdict was right; for whilst they were
at the plaintiff's, there was a particular reason for
the particular prohibition; yet the causeless turning
her away destitute afterwards, gave her the general
credit again: and if a husband should be allowed,
under the notion of a particular prohibition, to
destroy her obtaining credit in one place, he may,
in the same manner, prevent it with all people she
is acquainted with. He appears to be a wrong
doer, and therefore has no right to prohibit any
body. They distinguished this case, from the case

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of *Manby v. Scott*, 1 Sid. 109. for there the wife was guilty of the first wrong in eloping. *Bolton v. Prentice*, 2 Str. 1214. *Vide Salk.* 118. *Lord Ray.* 196.

If wife elopes,
h. band not lia-
ble, tho' no no-
tice be given.

If the wife elope from her husband, he shall not be liable, tho' the tradesman who trusts her *has no notice* of the elopement. It is sufficient for the husband to give general notice, *tha' tradesmen, &c. should not trust his wife.* Tho' the husband and wife cohabit, yet he may forbid any particular tradesman to trust her, and such prohibition to the tradesman's servant, is sufficient. *Bull.* 133. *cites Longworth and Hucklemore, per Holt. Vide Salk.* 118.

A delivery to
the wife at the
husband's re-
quest, in his ab-
sence, is a deli-
very to the hus-
band.

The plaintiff declared that the defendant was indebted for meat, &c. found by the plaintiff at the defendant's request: and on evidence it appeared, to be found *for the defendant's wife, at his request, during his absence.* It was holden, "*that a delivery to the wife, at the husband's request, is in law a delivery to the husband,*" and that so he is chargeable; tho' it was said, that it would be wrong in the case of a third person. *Ro's v. Noel*, E. 31 Geo. 2. C. B. *Bull.* 133. 3 *Wils.* 389. But if husband and wife live *separate*, and the action is brought for her maintenance, it should not be laid as necessaries furnished to him, but the *special matter* should be stated; for otherwise a recovery in that action would not be a bar to a special one brought for the maintenance of the wife. 1 Str. 127. *Bull.* 136. *Ramsden v. Ambrose.*

Man suffers a
woman to go by
his name.

If a man cohabits with a woman, allows her to *assume his name*, and *passes her to the world for his wife*, though in fact *he is not married to her*; yet is he liable to her contracts for necessaries. *Hudson v. Brent*, Lord M. Hil. 26 Geo. 3.

A tradesman,
upon elopement
of the wife, can-
not recover.

Lord Raymond held, that if a woman elopes from her husband, tho' she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound. Indeed, says he, if he refuse to receive her again, *from that time*, it may be an answer to the

the elopement. *Child v. Hardyman*, 2 Str. 875. In this case, the husband did not absolutely refuse to receive her again; but agreed, that she should neither sit at his table, nor have the government of his children, but should be kept in a garret, and she deserved no better usage. It appeared she lived in a lewd manner, and that one *Nott* was locked up in her bed-chamber, &c.

The plaintiff, who was an apothecary, sued the defendant, who lived in *Chichester*, for physic administered to his wife in *London*, who had been parted by consent for five years, and on separation, articulated to allow her 20*l.* per annum, which he accordingly did, and it appeared that the plaintiff did not know her to be a feme covert, at the time when the medicines were given; per *Holt*, If husband and wife part by consent, and the husband secure her an allowance, it is in consideration that he shall not be charged any more by her, and a personal knowledge is not necessary, so it be publicly known, and such public notification need not be at *London*, where the debt was contracted, but it is sufficient if it be where the parties lived, viz. in this case, at *Chichester*; but if the debt were contracted in so short a time after the agreement, as that it could not be known at *London*, the husband would be liable. *Tod v. Stokes*, 1 Lord Ray, 444. Salk. 116. Action against the feme, plea coverture, replication that the husband and she lived apart, from whom she had a separate maintenance, and so liable to her own debt; and, on demurrer, it was holden to be good, and that the husband's residence on the spot, or in *Ireland*, where he did live, made no difference. *Ringstead v. Lady Laneborough*, 1 Term Rep. 5. *Corbett v. Poelnitz*. S. P.

After a solemn declaration by a woman that she was married to a man, and that goods in his possession were his goods in her right, she shall never be allowed to say (at least against creditors) that she was not married to him, and that the goods were her sole property. *Mace v. Cadell*, Cowp. Rep. 233.

A voluntary pension shall not exempt the husband from being liable to be sued by his wife's creditors, by whom she was supplied with necessities.

Action against the Honourable Mr. Harvy, second son of the late Earl of Bristol, and made to the present Earl, for lodging and necessaries for his wife, during her residence at Bristol, (which her health absolutely required,) wherein a verdict had been given for the plaintiff. It appeared she paid part herself, for the former part of the time; and that she had a *pension*, during pleasure from the crown, of 300*l. per annum*, granted to her in *her own name*, but not by agreement or otherwise appropriated at all to her own use. That on her return from Bristol, her husband shut his doors against her. That Harvy had never made or agreed to make any separate allowance, or had contributed any thing towards her support, since he had so shut his doors against her, nor had she any use of his table, servants, or equipage; and evidence given of his having 1800*l. per annum*, verdict for plaintiff. On motion for a new trial, the court were clear, that the husband was liable, and that the verdict ought not to be set aside. Here is no agreement for a separation, but he has sent her adrift by shutting his doors against her; he allows her no separate maintenance, nor any support at all. And there is no pretence of this lodging and other support provided for her by the plaintiff, being improper for her degree and condition of life. And as she had no maintenance from her husband, nor admittance into his house, she was obliged to procure lodging and maintenance somewhere else. Every man is obliged to maintain his wife. The pension is only a voluntary grace and bounty of the crown, and during pleasure; not what any creditor of hers, even for her necessary subsistence suitable to her degree and rank of life, can be supposed to give her credit upon. *Rule discharged. Thompson v. Harvy, 4 Burr. 2177.*

How far a jury have, under the direction of Lord Kenyon, ascertained a

Action for the sale of millinery goods to the amount of 93*l.* to defendant's wife, all in nine months; one cloak all lace, 31*l.* 10*s.*; another, 18*l.* 18*s.*; a pair of ear-rings, three guineas; and lace,

lace, a guinea per yard. There was no dispute that the goods were delivered to this lady, who was the wife of a clergyman at *Leicester*: The defendant paid 40*l.* into court, and pleaded the general issue. The father of defendant, a merchant, proved, that subsequent to the delivery of the goods, he sent notice to plaintiffs not to trust his daughter-in-law with any more goods, without an authority from his son; who, he thought, could have no objection to what he did. He saw plaintiff's bill, and told them, part of the goods would be paid for. He was at his own house in the month of *August* 1792, for twelve days, but did not remember he saw his daughter dressed out in a cloak richly ornamented with fine lace. That his son's living was worth from 230*l.* to 250*l.* per annum, free. That he had the reversion of an estate worth 700*l.* per annum, but there was a mortgage of 4000*l.* on it, besides other incumbrances. The witness said, he had six children, defendant was his eldest son, and had been married four years. Miss *Forster*, plaintiff's shopwoman, was called, and said, the goods were sold to the defendant's wife under the idea of her being a lady of fashion. That she thought her so, from seeing her talk to *Lady Hawke*, *Lady Sey and Sale*, and others. They had not been acquainted with her before at the house, but took it for granted she was a woman of fashion. The bill was all had in less than nine months; four bonnets and a cap in one day; the cloaks came to 50*l.* 8*s.*, earrings, three guineas. It appeared that part of the goods were delivered in *Edwards-road*, not the residence of the defendant. *Lord Kenyon* said, this appeared to him to be a great cause, and deserved the consideration of the jury, not from the size of the cause itself, but from the influence which the decision of the question between the parties, might have upon the public; for if this bill was to be supported up to its full extent, there was no person in the kingdom almost, however low his degree in life might be, who might not, in a few months,

months, be called upon to answer for contracts made by his wife, up to an extent that might ruin him. The present demand proceeded on this ground, that whatever character the wife might chuse to assume to herself, the tradesman might trust to any extent, and suffer her to contract debts up to any amount that she chose to contract, agreeable to that character. This bill comprehended a space of time somewhat *less than nine months*. The relation which was contracted by husband and wife, called on the husband, *up to the extent of his ability, considering the other members of his family, considering also the situation he was to fill in life*, to cloath her in a decent and becoming, and even in a liberal manner: Just what the moral relation required, the law also required; for it was more than 100 years since, that one of the ablest (a) judges that ever sat in *Westminster Hall*, entered into a full and minute discussion on all these points; and the rule he had laid down had been adopted by every man of sense since, and was exactly that which had been stated by the learned counsel for the defendant,—“*that a husband was to provide for his wife according to her situation, and according to his situation in-life;*” and if by accident a verdict should be given to carry the demand beyond that, the most pernicious effects would ensue to the rest of the community in general, and it would be most prejudicial to trade. For if the law laid down a rule to which people in general would not agree, and which succeeding juries would not adopt, it would be prejudicial to those who might be induced to trust persons in the situation of this woman, and who afterwards would not be suffered to recover. He then stated the defendant's income, and the question, Whether the bill was a debt fit to be contracted by the wife of a person who had between 200*l.* and 300*l.* a year; not for the necessaries of life, not for gowns and linen, which might be

(a) *Lord Hale, 1 Sid. 109.*

useful, but only for *trappings*, which were not fit to set off the person of a clergyman's wife? Then, he said, one would be sorry that tradesmen should be losers; but when they carry their goods to market, they ought to carry *common sense* and *common prudence* with them, and ought to have made inquiry, who this woman was. They trusted to her outward appearance, and they trusted her as a person, which she was not; when, by proper inquiry, they might have been undeceived. If this bill was to be supported, it would be in the power of any *vicious or imprudent woman*, to ruin her husband, and all the branches of his family. If this bill did not go beyond the *legal* and *reasonable* limits, his lordship said, he should be glad to know, what were the *bounds of propriety*, within which such a woman ought to be kept? He confessed, that to him, it seemed the money which had been already paid, *exceeded considerably that which was due from this clergyman's wife for cloathing*. If the jury thought he had mistaken the convenience and law of the case, they would find for the plaintiffs, and give them the difference of the sum paid into court; but if they were of the same opinion with his lordship, they would find for the defendant; which they did. *Sittings at Guildhall, London, July 2, 1792, by a special jury from Middlesex, by consent. Dyde and an. v. Bewicke.* Adjourned from Westminster, being the last cause.

Mr. *Erskine*, in his argument for defendant, said, that he was rising up in the *defence of trade in particular*, as well as in the *defence of the public in general*; for if there was any one thing more destructive to the *interests of the community* than another, and more *productive of those bankruptcies*, which they were *every day obliged to deplore*, and the consequence of their spreading throughout the community, *it was this sort of traffic, which was worse than twenty wars*. The money of persons thus trusting would not come in when they wanted it; they would therefore become bankrupts, and so would their creditors in their turn, from the same

same cause, which would be very hurtful to trade in general.

For servants wages.

No occasion to state in what capacity the servant was, nor the time.

This count is the proper one for an agreed salary.

Indebitatus assumpsit for work and labor generally.

If proof cannot be made of the price agreed for, then these two counts are necessary.

Quantum meruit

Hampshire, to wit. John Denn complains of Richard Fenn, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself; *For that whereas*, the said Richard, on the 16th day of September, in the year of our Lord 1794, to wit, at Fareham, in the said county, was indebted to the said John, in 60*l.* of lawful money of Great Britain, for the wages or salary of the said John before that time due and owing to the said John from the said Richard, for the service of the said John, by him before that time done, performed, and bestowed, as the servant of the said Richard, on his retainer, and at his special instance and request, for a long time then elapsed; and being so indebted, he the said Richard, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at Fareham aforesaid, in the said county, undertook, and then and there faithfully promised the said John to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, the said Richard afterwards, to wit, on the same day and year aforesaid, at Fareham aforesaid, in the said county, was indebted to the said John, in other 60*l.* of like lawful money, for the work and labor, care and diligence, of the said John, by him the said John before that time done, performed, and bestowed, in and about the business of the said Richard, and for the said Richard, and at his instance and request; he the said Richard, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at Fareham aforesaid, in the said county, undertook, and then and there faithfully promised the said John, to pay him the said last-mentioned sum of money; when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at Fareham aforesaid, in the said county, in consideration that the said John, at the like special instance and request of the said Richard, had before that time done,

done, performed, and bestowed, other his work and labor, care and diligence in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Parham* aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: Yet the said *Richard* (altho' often requested, &c.) *Breach.* hath not yet paid the said several sums of money, or any part thereof, to the said *John*, but he to pay the same, or any part thereof, to the said *John*, the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 100*l.*, and therefore he brings his suit, &c. pledges, &c. In case the servant has lent, or paid money for his master, add a count for each; or if an account has been stated and settled, add a count on an *infirmul computasset*. The first count requires proof of a sum agreed on by defendant to pay. In case of failure of that proof, the third count is on the *quantum meruit*.

Berkshire, to wit. *Richard Fenn*, late of *Reading*, For a surveyor in the said county, yeoman, was attached to an- in drawing of swer *John Denn*, in a plea of trespass on the case, plans and surveying of and whereupon the said *John*, by *Joseph Doe* his houses, &c. attorney, complains; For that whereas, the said *Richard* on the 16th day of *October*, in the year of our Lord 1794, to wit, at *Reading*, in the said county, was indebted to the said *John*, in 60*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence of the said *John*, by him before that time done, performed, and bestowed, in and about the drawing of divers plans and elevations, of divers dwelling-houses and buildings,

for the said *Richard*, and on his retainer, and at his special instance and request; and also in and about the surveying, superintending, and taking care of a certain building, to wit. a certain dwelling-house of him the said *Richard*, during the erection thereof, to wit, at *Reading* aforesaid, on the like retainer of the said *Richard*, and at his special instance and request; and for the attendance and care of the said *John* in and about the same, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Reading* aforesaid, in the said county, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Reading* aforesaid, in the said county, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about the drawing of divers other plans and elevations, of divers other dwelling-houses, and other buildings, for the said *Richard*; and also in and about the surveying, superintending, and taking care of a certain other building, to wit, a certain other dwelling-house of him the said *Richard*, during the erection thereof, to wit, at *Reading* aforesaid, in the said county, at the like request of the said *Richard*; and had also attended and taken care of the same, at the like request of the said *Richard*; he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard*, should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Reading* aforesaid, in the said

said county, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice: *And whereas* the said *Richard* afterwards, ^{Indebitatus as-} to wit, on the same day and year aforesaid, at ^{sumpsit for work} *Reading* aforesaid, in the said county, was indebted ^{done in and} to the said *John* in other 60*l.* of like lawful money, ^{about the going} of journees, &c. for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time done, performed, and bestowed in and about the business of the said *Richard*, and for the said *Richard*; and at his request, and for divers journees and attendances, before that time performed and made by the said *John*, for the said *Richard*, and at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Reading* aforesaid, in the said county, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day ^{Quantum meruit.} and year aforesaid, at *Reading* aforesaid, in the said county, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*; and had before that time, at the like request of the said *Richard*, gone, performed, and made divers other journees, and attendances, in and about the business of the said *Richard*, and for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested: And the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Reading* aforesaid, in the said county, whereof

Declarations in Assumpsit.

Breach.

the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice; (add a count for money paid, and an *insimul computasset*, if necessary :) Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John*, he the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John* his damage of 80*l.*, and therefore he brings his suit, &c.

For work done
as a surveyor
and measurer.

London, to wit. John Denn complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*, on the 10th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the work and labor, care, skill, and diligence of the said *John*, as a surveyor and measurer, before that time done, performed, and bestowed, by the said *John*, for the said *Richard*, at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on, &c. at, *Quantum meruit. &c.* undertook, &c. And whereas, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care, skill, and diligence, as a surveyor and measurer, for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that, &c. (Add a count for money paid, and common conclusion.)

For the cure of a
wound by a per-
son not a sut-

London, to wit. John Denn complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*,

Richard, on the 16th day of *October*, in the year ^{geon or apothecary.} 1794, to wit, at *London* aforesaid, in the parish of *Saint Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 70*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time done, performed, and bestowed, in and about the healing and curing of the said *Richard* of divers wounds, diseases, and maladies, under which he labored and languished, and at his special instance and request, and for divers ointments, plaisters, and other necessary things, before that time found, provided, administered, delivered, used, and applied by the said *John* on that occasion, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, afterwards to wit, on the same day ^{Quantum meruit.} and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about the healing and curing the said *Richard* of divers other wounds, diseases, and maladies, under which he labored and languished; and had, at the like request of the said *Richard*, before that time, found, provided, administered, delivered, used, and applied, divers other ointments, plaisters, and other necessary things; he the said *Richard* then and there undertook, and faithfully promised the said *John* to pay him so much money, as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested;

Declarations in Assumpsit.

and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 70*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, (and an *in simul computasset* if necessary,) with the common conclusion.

If a person not being a *surgeon*, cure a wound, he is entitled to a *quantum meruit*, for his performance of the cure, if he be employed by the defendant.

Seamen's Wages.

Yorkshire, to wit. *John Doe* complains of *Richard Roe*, being in the custody of the marshal, of the marshallsea, of our lord the now king, before the king himself, *For that whereas* the said *Richard*, on the 16th day of *October*, in the year of our Lord 1794, to wit, at *Doncaster*, in the said county, was indebted to the said *John* in 10*l.* of lawful money of *Great Britain*, for the wages and salary of the said *John*, before that time due and owing from the said *Richard* to the said *John*, for his service before that time done and performed, by the said *John* for the said *Richard*, as a mate and mariner, in, of, and on board a certain ship or vessel called the *Grand Duke*, whereof the said *Richard* was master (a), and on his retainer, and at his special instance and request; and being so indebted, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, in the said county, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, for the said *Richard*, in and about the business and affairs of the said *Richard*, as a mate and mariner on board a certain other ship or vessel called the *Grand Duke*, whereof the said *Richard* was master (b), at his special instance and request, he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto

For wages as a mate of a ship.

Quantum meruit for work done as a mate and mariner.

- (a) If against the owner, say, owner.
(b) If owner, say, owner.

Declarations in Assumpsit.

afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 10*l.* of like lawful money, to wit at *Doncaster* aforesaid, in the said county, whereof the said *Richard* afterwards to wit, on the day and year aforesaid, there had notice. (Add money laid out, and, if necessary, an *in simul computasset*, with the common conclusion.)

For a common
sailor's wages
against the
owner.

Norfolk, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard* on the 16th day of *October*, in the year of our Lord 1794, to wit, at *Thetford* in the said county, was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the *wages and salary* of the said *John*, before that time due and owing from the said *Richard* to the said *John*, for his service before then done and performed, by the said *John* for the said *Richard*; as a mariner in, of, and on board a certain ship or vessel called the *Margaret*, whereof the said *Richard* was owner, and on his retainer, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Thetford* aforesaid, in the said county, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto

Quantum meruit.

afterwards requested: *And whereas* afterwards, to wit, on the same day and year aforesaid, at *Thetford* aforesaid, in the said county, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about the business and affairs of the said *Richard*, as a seaman on board a certain ship or vessel called the *Margaret*, whereof the said *Richard* was owner, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he there-

fore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 20*l.* of like lawful money, to wit, at *Thetford* aforesaid, whereof the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice. Some pleaders add two counts for work and labor generally; but I see no reason for them, but a count for money paid is usual with the common conclusion.

Notes.

Mariners are persons chosen and appointed by *A.* to sailors the *master* to navigate the ship, for whose faults ^{wages.} and miscarriages he must answer; and, as they are his servants, he may correct and punish them according as the usage is at sea. *Moll.* 209. So are the owners answerable for their faults and miscarriages. 1 *Roll. Abr.* 530.

Freight is the mother of wages, and the safety ^{Freight.} of the ship the mother of freight; and wherever freight is due, wages are. If a ship is lost before it comes to a delivering-port, no freight nor wages are due.

The whole voyage must be performed, or the ^{The whole voyage must be performed.} sailors shall not be entitled to any wages; for the ship is only entitled to freight on the delivery of the cargo. 3 *Burr.* 1844. *Hernaman v. Bowden*. And in this case, a voyage to *Newfoundland*, and thence to *Spain, Portugal, or some port in the Mediterranean*, was holden to be one entire voyage, and the wages not payable, tho' the ship had arrived at *Newfoundland*, and was taken in its voyage from *Newfoundland*, to the port of delivery of the fish.

If advance money be paid in part of freight, and if advance money be paid named so in the charter-party, tho' the ship be lost before it comes to a delivering-port, yet wages ^{in part of freight.} are due according to the proportion of the freight

paid before; for the freighters cannot have their money. *Per Saunders, C. J. 2 Show. 283.*

If a ship be
loading, &c.

Where no freight is earning by the ship, the mariners are not entitled to wages. Therefore, whilst a ship is lading or unlading, the sailors are not entitled to wages, no freight being ever paid in that case; but, if there be a special agreement to allow wages during that time, it was held, that the rule does not control the special agreement. *Campion v. Nicholas, 1 Str. 405.*

If service be on
board letters of
marque, &c.

An officer or sailor who has engaged to serve on board a letter of marque, for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she completes her voyage, altho' he shall have been sent from the ship before the capture, as a prize-master on board a prize taken in the course of the voyage. The ship sets out in a double capacity: she is to perform a trading voyage, and to carry negroes from Africa to America; but, before that, she is to cruise three months as a privateer. All demand on account of the trading voyage is gone. But, in her character as a privateer, the crew are entitled to no wages; they all run equal risks, and take their chance of their respective shares in prizes. *Abernethy v. Landale, Dougl. 539.*

N. B. All questions concerning wages, the officers and common mariners are exactly on the same footing. *Hook v. Moreton, 1 Ld. Ray. 357. Baily v. Grant, ibld. 632.*

If ship is seized,
&c.

If the ship is seized for debt, or for having contraband goods on board, the sailors have a right to their wages up to the time of the seizure, because, tho' the voyage was never completed, that was owing to the act of the owners, and not to any negligence of the crew.

The mariners
may sue in
admiralty court.

The mariners may sue in the admiralty court for their wages, altho' the hiring was by the master on land; and this is allowed of in favor of navigation, for here they may all join in the same

libel.

libel: also, by the admiral law, they have remedy against the *ship* and *owners*, as well as against the *master*; and it would be a great discouragement to seafaring men to oblige them to separate actions, and those against a master, who may happen to be insolvent. *Vent.* 146. 343. 3 *Mod.* 244. *Salk.* 33. *Ld. Ray.* 632. 576. 1044. 12 *Mod.* 405. 4 *Ann.* c. 16.

So if the officers under the master, as the mate, *Salk.* 33., purser, 2 *Str.* 858., boatswain, &c. carpenter, *Str.* 707.; for tho' they contract with the master, yet it is on the credit of the ship, &c. But if there be any *special agreement* by which the mariners are to receive their wages in any other manner than is usual, or if the agreement is *under seal*, the mariners cannot sue in the *admiralty court*. *Salk.* 31. *Opys v. Addison*. Nor can the master sue in the admiralty court, for his contract is on the credit of the owners, and not like that of the mariners, which is on the credit of the ship. *Salk.* 33. *Ld. Ray.* 576.

But if there be special agreement, or a deed under seal,

By the civil law, and custom of merchants, if the ship be cast away, or perish thro' the mariners default, they lose their wages: so if taken by pirates, or if they run away; for if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. *Sid.* 179. *Mod.* 93. *Ld. Ray.* 398. 576. 639. 650. 739. *Str.* 707.

By Stat. 22 and 23 *Car.* 2. c. 11. s. 7. If mariners or inferior officers of an *English* ship, laden with goods, &c. shall decline, or refuse to fight and defend the ship, when commanded by the master or commander, or shall utter words to discourage the other mariners from defending the ship, every mariner who shall be found guilty thereof, shall lose all his wages due to him, together with such goods as he hath on board, and suffer six months imprisonment.

If mariners decline to fight, they lose their wages.

If a seaman becomes an hostage, and he is promised wages, for the time he remains with the enemy,

If seaman becomes an hostage.

enemy, till the ransom is paid, this being for the benefit of the ship, the owners are liable for the whole time he remains in custody of the enemy. *Yates v. Hall*, 1 Term Rep. 73.

Master must sue
at common law.

The master of a ship must sue at common law; for his contract is on the credit of the owners, and not like that of the mariners, which is on the credit of the ship. 1 Salk. 31. *Clay v. Sudgrave*, *ibid.* 33. *Ld. Raym.* 576.

Mariners may
sue master or
owners.

Mariners may sue at common law either the master or owners; but the courts of common law cannot stop the ship, and each mariner must bring a separate action. And the action must be brought within six years by stat. 4 Ann. c. 16.

Time of action.

For work done
as a shipwright.

Kent, to wit. *Richard Roe*, late of *Maidstone*, in the said county, and *Thomas Lee* of the same place yeoman, were attached to answer *John Doe* in a plea of trespass on the case; and whereupon the said *John*, by *Simon Lee* his attorney, complains; For that whereas, the said *Richard* and *Thomas*, on the 16th day of *October*, in the year of our Lord 1794, to wit, at *Maidstone* aforesaid, in the said county, were indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, as a shipwright (a), by him the said *John* and his servants, before that time done, performed, and bestowed, in and about the repairing and mending of a certain ship or vessel called the *Lord Ebatbam*, of the said *Richard* and *Thomas*, and at their special instance and request, and for divers materials, and other necessary things, by the said *John* before that time found, provided, used, and applied, in and about the said work, at the like request of the said *Richard* and *Thomas*; and being so indebted, they the said *Richard* and *Thomas*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Maidstone* aforesaid, in the county aforesaid, undertook, and then

(a) *Carpenter and gilder.*

and

and there faithfully promised the said *John*, to pay him the said sum of money, when they should be thereto afterwards requested: *And whereas afterwards, to wit, on the same day and year aforesaid, at Maidstone aforesaid, in the said county, in consideration that the said John, at the like special instance and request of the said Richard and Thomas, had before that time done, performed, and bestowed, other his work and labor, care and diligence, as a shipwright (a), by himself and his servants, in and about the repairing and mending of a certain other ship or vessel called the Lord Chatham, of the said Richard and Thomas, and had before that time, at the like request of the said Richard and Thomas, found, provided, used and applied, divers other materials, and other necessary things, in and about the said last-mentioned work, they the said Richard and Thomas then and there undertook; and faithfully promised the said John, to pay him so much money as he therefore reasonably deserved to have, when they should be thereto afterwards requested; and the said John avers, that he therefore reasonably deserved to have of the said Richard and Thomas other 100*l.* of like lawful money, to wit, at Maidstone aforesaid, in the county aforesaid, whereof the said Richard and John afterwards to wit, on the same day and year aforesaid, there had notice. Some pleaders add two counts for work and labor generally, but there is no necessity for them. Add a count for money laid out, (and an *insimul computasset*, if necessary,) with the common conclusion.*

*Quantum meruit
thereon.*

Notes.

With respect to the repairs done to the ship, if Repair at home, they are done *at home*, there is no lien on the ship or abroad. itself, but the owners must be personally sued; but if the repairs are done *abroad*, by the maritime

(a) Carver and gilder.

law,

Election to sue
master or
owners.

law, the *master* may hypothecate the ship's bottom. 2 *Pier Will.* 367. *Waskinson v. Barnardiston.*

The person who repairs a ship has his election, either to sue the *master* who employs him, or the *owners*; but if he undertakes it on a *special promise* from either, the other is discharged. 2 *Str.* 816. *Garnam v. Bennett.* And if there be no such agreement, both are subject; and no private agreement between the master and owners shall deprive a person, who has a charge against the ship for repairs, from suing either party. *Cowp. Rep.* 636. *Rich v. Coe.* But if the plaintiff had had notice of the contract between the master and owners, it might be a ground to absolve the owners. *Ibid.* The owners are generally liable, but the master only on his contract, and no further. *Cow.* 639.

To subject a person as owner, he must be absolute owner, and in possession. *Jackson v. Vernon,* 1 *H. Black. Rep.* 114.

The master is not liable for necessaries furnished to the ship before the time he became master of her, for there is no contract. *Farmer v. Davis,* *Hil.* 26 *Geo.* 3. 1 *Term Rep.* 108.

Action lies by a
shipwright for
the repair, tho'
the ship be
burnt in the
dock before
work complete.

A ship being damaged, was obliged to put back in order to be repaired in dock, and was to have gone out of the dock on a *Sunday*; in the interim, viz. on the day before, and when only three hours work was wanting to complete the repair, a fire happened at an adjacent brew-house, which communicated to the dock, and the ship was burnt. It was the shipwright's own dock, and the owner of the ship had agreed to pay 50*l.* for the use of it. Plaintiff notwithstanding brought his action for the repair, and the court held it maintainable. 3 *Burr.* 1594. *Menetone v. Athowes.* *Ld. M.* seemed to lay great stress on payment for the dock. *Mr. J. Wilmot* said, so that it is like a horse that a farrier was curing, being burnt in the owner's own stable.

For work and
labor, goods
sold and deliver-
ed, money paid,
etc.

London, to wit. *John Dean* and *Thomas Roe*, assignees of the estate and effects of *Simon Doe*, a bankrupt, according to the force, form, and effect of

of the several statutes made concerning bankrupts, etc. the assignees
 complain of *Richard Penn*, being in the custody of of a bankrupt.
 the marshal, of the marshalsea, of our lord the now Vide p. 125.
 king, before the king himself, of a plea of trespass
 on the case; *For that whereas*, the said *Richard*, on Any time before
 the 16th day of *October*, in the year of our Lord the commission is-
 1793, to wit, at *London* aforesaid, in the parish of sued, and after
Saint Mary-le-Bow, in the ward of *Cheap*, was in- the work done.
 debted to the said *Simon Doe*, before he became a
 bankrupt, in 60*l.* of lawful money of *Great Bri-*
tain, for the work and labor, care and diligence, of
 the said *Simon* before he became a bankrupt, before
 that time done, performed, and bestowed, in and
 about the business of the said *Richard*, and for the
 said *Richard*, and at his special instance and re-
 quest, and for divers materials and other necessary
 things found, provided, used, and applied by the
 said *Simon*, before he became a bankrupt, in and
 about the business of the said *Richard*, and for the
 said *Richard*, at his like request; and being so in-
 debted, he the said *Richard*, in consideration there-
 of, afterwards, to wit, on the same day and year
 aforesaid, at *London* aforesaid, in the parish and
 ward aforesaid, undertook, and then and there faith-
 fully promised the said *Simon*, before he became a
 bankrupt, to pay him the said sum of money, when
 he should be thereto afterwards requested: *And Quantum meruit*
whereas, afterwards, to wit, on the same day and thereon.
 year aforesaid, at *London* aforesaid, in the parish
 and ward aforesaid, in consideration that the said
Simon, before he became a bankrupt, at the like
 request of the said *Richard*, had before that time
 done, performed, and bestowed, other his work
 and labor, care and diligence, in and about other
 the business of the said *Richard*, and for the said
Richard; and had also, at the like request of the
 said *Richard*, found, provided, used, and applied
 divers materials, and other necessary things, in and
 about the said business of the said *Richard*, and for
 the said *Richard*; he the said *Richard* then and
 there undertook, and faithfully promised the said
Simon,

Declarations in Assumpsit.

Indebitatus as-
sumpsit for goods
sold and deliver-
ed.

Quantum meruit.

Simon, before he became a bankrupt, to pay him so much money, as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* and *Thomas*, assignees as aforesaid, aver, that the said *Simon*, before he became a bankrupt, therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Simon*, before he became a bankrupt, in other 60*l.* of like lawful money, for divers goods, wares, and merchandizes, by the said *Simon*, before he became a bankrupt, before that time sold and delivered to the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *Simon*, before he became a bankrupt, to pay him the said sum of money last mentioned, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *Simon*, before he became a bankrupt, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard*, divers other goods, wares, and merchandizes, he the said *Richard* then and there undertook, and faithfully promised the said *Simon*, before he became a bankrupt, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* and *Thomas*, assignees as aforesaid, aver, that the said *Simon*, before he became a bankrupt, therefore reasonably deserved to have
of

of the said *Richard*, other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Simon*, before he became a bankrupt, in other 60*l.* of like lawful money, for money by the said *Simon*, before he became a bankrupt, before that time laid out, expended, and paid, to and for the use of the said *Richard*, and at his special instance and request, and for other money by the said *Simon*, before he became a bankrupt, before that time lent and advanced to the said *Richard*, at his like request; and for other money by the said *Richard* before that time had and received, to and for the use of the said *Simon*, before he became a bankrupt; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *Simon*, before he became a bankrupt, to pay him the said last mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *Simon*, of and concerning divers other sums of money before that time due and owing from the said *Richard* to the said *Simon*, before he became a bankrupt; and then being in arrear and unpaid, and upon that account, the said *Richard* was then and there found in arrear and indebted to the said *Simon*, before he became a bankrupt, in other 60*l.* of like lawful money; and being so found in arrear and indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully

Money laid out,
money lent, and
money had and
received, in one
account.

Infimus compo-
sisset.

Declarations in Assumpsit.

Breach,

faithfully promised the said *Simon*, before he became a bankrupt, to pay him the said last mentioned sum of money, when he should be thereto afterwards requested: Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Simon*, before he became a bankrupt, or to the said *John* and *Thomas*, assignees as aforesaid, since the said *Simon* became a bankrupt, or to either of them; but he to pay the same, or any part thereof, to the said *Simon*, before he became a bankrupt, or to the said *John* and *Thomas*, assignees as aforesaid, since the bankruptcy of the said *Simon*, or to either of them, hath hitherto wholly refused, and still refuses, to the said *John* and *Thomas* assignees as aforesaid, their damage of 100*l.*; and therefore they bring their suit, &c. pledges, &c.

Notes.

Curia. From the moment a person becomes a bankrupt, the property of all his goods, debts, credits, &c. are vested in the assignees, *duly chosen* under the commission, but they cannot declare in *trouver* or *assumpsit*, as of their own goods or debts, but must declare as assignees of the bankrupt, and the defendant may wage his law, or plead the statute of limitations, as the case may happen to be or require. *Kitchin and others v. Campbell.* 3 *Wils.* 307. *cites* 1 *Sid.* 171. 1 *Lev.* 173. *Comb.* 123. & *Show.* 112. But for all demands on contracts entered into by the bankrupt, after an act of bankruptcy committed, they may bring the action in their own names, for after his bankruptcy, the bankrupt is to be considered but as their agent. *Evans v. Mann.* *Cow. Rep.* 570.

5 *Gen.* 2. c. 30. Creditors cannot give a general power to assignees to prosecute suits at their own discretion, but there must be a meeting of creditors upon notice in the *Gazette*, to consider of each particular. *In Can.* 1 *Ark.*

91. *pl. 39.* By *stat. 5 Geo. 2. c. 30. s. 38.* No suit in equity shall be commenced by assignees without the consent of the major part in value of the creditors, who shall be at a meeting, pursuant to notice in the Gazette for that purpose.

In *Rig v. Wilmer*, it was said by the court (in an action of assumpsit, brought by the plaintiff as assignee, where it was stated, that defendant was indebted to the bankrupt, and being so indebted, he promised to pay the bankrupt, and throughout the whole declaration there was no assumpsit to the plaintiff as assignee); what reason was there to differ this, from the common case, of an action by an executor, where you always declare upon a promise to the testator, and yet the promise is as strongly transferred to the executor, as it is here to the assignee. Judgment for plaintiff on dem. 1 Str. 697.

The statutes vest in the assignees all the property that the bankrupt had at the time of the crime committed (for the old statutes consider him as a criminal) they make the sale by the commissioners good, against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed, before the act of bankruptcy. *Croper & al. v. Chitty and an.* 1 Burr. 31.

Assumpsit lies for money had and received, by the assignees, whether the money for which the bankrupt's goods were sold be paid into the hands of a plaintiff on a *fi ri facias*, or of any others; whoever has received the money for the bankrupt's goods is supposed in justice to have received the same for the use of the assignees, in whom the property of those goods by law was vested, and to have promised to pay the same to the assignees; there is a supposed privity of contract between the persons whose money it lawfully is, and the person who has got or received it. *Kitchen & al. Assig. v. Campbell*, 3 Will. 304. see 3 Lev. 191. Lord Ray. 1216. Holt, 95. Vez. 326.

T

By

Declarations in Assignments.

Debts paid *bona fide* before knowledge of bankruptcy, good.

By stat. 1 Jac. 1. c. 15. No debtor of the bankrupt, shall be endangered for the payment of his or her debt, truly and *bona fide* made to such bankrupt, before such time, as he shall understand or know that he was become a bankrupt.

But otherwise, if with knowledge.

The defendant, who was a bankrupt, paid drafts drawn on him after he knew of the act of bankruptcy, he was compelled to pay the amount again to the assignees. 2 Term Rep. 113. *Vernon v. Hanky*, vide 479. *Foster v. Allenson*.

Where a bankrupt was in prison, and notice sent to his broker employed to sell goods that a commission would be issued, if the goods be sold before the commission, and money paid over, the broker is liable to the assignees.

The arrest was 19 Jan. the plaintiff the now assignee; the bankrupt lay two months in gaol, which expired 26th March. The 19th Feb. the plaintiff's attorney wrote to defendant (who had been employed by the bankrupt as a broker, to sell his effects) not to sell them, as Langman had committed an act of bankruptcy; and that a commission would shortly issue against him; he sold before the two months expired, and paid the money over to the bankrupt. This was held as no payment within the above statute, as there was notice to him while the act of bankruptcy was inchoate; and which afterwards, being complete, vested the property in the assignees from the first arrest; and defendant was liable for money had and received to their use. *King v. Langman and Laith*, 2 Term Rep. 141.

If money on bills paid after secret act.

By stat. 19 Geo. 2. c. 2. If money on bills, or in the course of business, is *bona fide* paid by the bankrupt to a fair creditor, tho' after a secret act of bankruptcy committed, it shall not be liable to be refunded, provided he had no notice, prior to the receiving of his debt, that the debtor was insolvent.

Proofs to support the commission.

The first proof is, That the party was a trader (a). 2. The act of bankruptcy (b). 3. Petitioning credi-

(a) 13 Eliz. c. 7. 21 Jac. 1. c. 19. 5 Geo. 2. c. 30.

(b) 13 Eliz. c. 7. 1 Jac. 1. c. 15. 34 and 35 H. 8. c. 4. 21 Jac. 1. c. 19. 5 Geo. 2. c. 30. f. 19. l. 24. 4 Geo. 3. c. 33. l. 1.

tors' debt (c). 4. The issuing of the commission (d). 5. The execution of the assignment from the commissioners to the assignees (e). 6. A property in the bankrupt (f).

Two months previous to an act of bankruptcy, the defendant sold an estate to one *Patterson*, who paid him for it by a bill of exchange drawn on the bankrupt, and payable the 7th of February 1785. Defendant applied for payment when it became due to the bankrupt, but was told that it was not then convenient to pay it, but if he would hold the bill, he should be paid interest. He did hold it, until 22d May 1785, when he demanded payment, and received the money; the assignees brought an action for money had and received, and the court said, that it was not a payment made in the course of business, and so he was not protected by the stat. 19 Geo. 2. c. 2. *Vernon assignee, v. Hall, 2 Term Rep. 639.*

Action for money had and received, verdict for plaintiff, with leave to move to set it aside, and enter a nonsuit on the following case. The testator, *Gravatt*, proved a debt of 410*l.* 1*s.* 7*d.* under the commission against *Fox*; afterwards a dividend of 6*s.* in the pound being declared, and *Gravatt* having died in the interval, the plaintiffs, as his executors, demanded their share of the dividend, 123*l.* 0*s.* 1*d.*, which was refused. *Plea, non assumpsit, and notice of set-off.* Lord M. said the action was maintainable. That the only way to question the proof of the debt taken by the commissioners, was by petition to the chancellor; that by the statutes, the oath of the party is to be the proof of the debt; and a particular penalty is im-

After the act of bankruptcy committed, he can only dispose of property in the regular course of trade, as by paying bills, &c. when regularly drawn.

Action lies against assignee under an order of dividend, and proceedings evidence of the debt. The assignee cannot set off.

At nisi prius.

(c) 5 Geo. 2. c. 30.

(d) The producing the commission under seal and petition to the chancellor, on which it was granted.

(e) The execution by the commissioners, by the subscribing witnesses.

(f) This includes every thing of which he is the visible or real owner; every thing of which he has the actual possession, or of which he has parted with or lost the possession, after an act of bankruptcy committed, or in contemplation of it.

Declarations in Assumpsit.

posed for swearing to a false debt(a): And That as the commissioners have a power of setting off mutual debts by 3 Geo. 2. c. 30. s. 82, *the sum proved, must be taken to be the balance due*; but if it should happen that only one side of the account appeared before the commissioners, or that any article was omitted on either side; on application to the great seal, the account would be again opened, and referred to the commissioners, or, in case of difficulty, to the master. The court took time to consider, and Lord M. delivered the opinion of the court. I allowed the plaintiff to recover their share of the dividend against the assignees, as money *positively and expressly paid into the hands of the assignees for their use*: We are all of opinion, that the direction was right, that the action was maintainable, and that after a debt is liquidated before the commissioners, it cannot be again litigated, but by an application to the great seal. *Rule disc.* *Brown and an. execut. v. Buller, assig. Dougl. 407.*

Declaration for
freight.

London, to wit. John Denn complains of Richard Fenn, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, For that whereas, the said Richard, on the 20th day of August, in the year of our Lord 1794, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said John in 60l. of lawful money of Great Britain, for certain freight before that time, and then due and payable from the said Richard to the said John, upon and for the carriage and conveyance of divers goods, wares, and merchandises of the said Richard, before that time carried and conveyed in a certain ship or vessel of the said John, from London aforesaid to Liverpool, and there, to wit, at Liverpool aforesaid, delivered to (b) the said Richard, and at his special instance and request; and being so indebted, he the

(a) 5 Geo. 2. c. 3. s. 29.

(b) An *indebitatus assumpsit* is good for freight, without mentioning what the freight consisted of. 1 Vent. 100.

said

Declarations in Assumpsit.

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said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested : *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *Richard*, at the like request of the said *John*, had before that time carried and conveyed, divers other goods, wares, and merchandises, in a certain other ship or vessel, of him the said *Richard*, from *London* aforesaid to *Liverpool* aforesaid, and there, to wit, at *Liverpool* aforesaid, delivered to the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested ; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other *60l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice : *Add a count for money laid out, and the common confusion.* N. B. I have seen declarations of this sort, with the addition of two counts for work and labor by the plaintiff and his servants, money laid out, and an account stated. With great submission, I do not see the necessity for the two counts for work and labor, unless to lengthen the declaration, as the plaintiff cannot fail recovering, on his *quantum meruit*, the accustomed prices. If there has been an account stated, then an *in simul computasset* is necessary to be added.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself; *For that whereas* the said *Richard*, on the 20th day of *October*, in the year of our Lord

Another declaration for freight of goods brought from *Maryland* to *London*.

Declarations in Assumpsit.

1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for the freight of divers goods, wares, and merchandises of the said *Richard*, by the said *John*, at the special instance and request of the said *Richard*, before that time carried, imported, and brought, in a (a) certain ship or vessel of the said *John*, called the *Sally*, and whereof the said *John* was owner, from parts beyond the seas, to wit, from *Maryland* in *America*, to the port of *London*, to wit, at *Westminster* aforesaid; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when

Quantum meruit.

he should be thereto afterwards requested: And whereas, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had, before that time, carried, imported, and brought, divers other goods, wares, and merchandises, of the said *Richard*, and for the said *Richard*, in (b) a certain other ship or vessel of the said *John*, called the *Sally*, and whereof the said *John* was owner, from parts beyond the seas, to wit, from *Maryland* in *America* aforesaid, to the port of *London* aforesaid, to wit, at *Westminster* aforesaid, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money, as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards to wit,

(a) If more than one ship say, in divers ships or vessels.

(b) In divers ships and vessels.

on the same day and year aforesaid, there had notice. *Add a count for money laid out, and a common conclusion.*

Notes.

Freight, or freight, in navigation and commerce, *Freight*, what the hire of a ship or vessel, or of a part of it, for the conveyance and carriage of goods from one port or place to another, or the sum agreed on between the owner and the merchant for the hire and use of a vessel (a). This is usually agreed on at the rate of so much for the voyage, or by the month, or *per ton*, and must be paid in preference to all other debts, for whose payment the goods stands engaged; and as these are responsible to the ship for her hire, so is the ship to the owner of the goods, in case of damage or waste thro' any defect of the vessel, or sailors. *Browes Lex Mercat.* 133.

No ship ought to be freighted without a charter-party. *Ma.* 97. And if the contract be by charter-party, the action is to be brought *on the covenant*. 3 *Lev.* 41. But, for freight *without this contract*, *assumpsit* lies.

The principal laws and rules relating to freight-Law and rules of freighting. ing are, that if a whole vessel be hired, and the merchant or person who hires it, do not give its full load or burthen, then the master of the vessel cannot, without his consent, take in any other goods, without accounting to him for freight.

That tho' the merchant do not load the full quantity of goods, agreed on, yet he shall pay the whole freight; and if he load more, he shall pay for the excess.

(a) The word is formed of the *French*, *fret*, signifying the same thing; or from *fret*, of *freum*, an arm of the sea; tho' others choose to derive it from the *German*, *fracht*, or the *Flemish*, *wracht*, signifying carriage.

Declarations in Assumpsit.

If a time be appointed by charter-party, and either the ship be not ready to take in, or the merchant to put on board, the parties are at liberty, with remedy by action, for the detriment.

If part be on board, and some misfortune prevent the merchant's sending the whole in time, the master may contract with another, and have freight, as damage for the time they were on board longer than limited. On the other hand, if the vessel is not ready, the merchant may ship the remainder of his goods aboard another, and recover damages against the first master or owners for the rest. *Cro. Car.* 383. 3 *Lev.* 283.

If a ship be freighted out and in (or out and home), there is no freight due till the *whole voyage* is performed; if therefore the ship perish coming home, the whole freight is lost. *Broun.* Par. 2. *Bright v. Cowper.*

Shipwreck.

The master shall take no freight for any goods lost by shipwreck, plundered by pirates, or taken by the enemy, unless the ship and goods be redeemed; in which case, he shall be paid his freight to the place where he was taken, upon contributing to the redemption.

If saved.

The master shall be paid his freight for the goods saved from shipwreck; and in case he cannot get a vessel to carry them, unto the place where they were bound, he shall be paid in proportion to the part of the voyage already gone.

ACTIONS are construed favourably for ship and owners.

As ships deserve wages like a labourer, the actions touching the same are, in the eye of the law, generally construed favourably for the ship and owners; and therefore, if four parts in five, make up their accounts with the freighters, and receive their proportions, yet the fifth man, may sue singly by himself, without joining with the rest, and this as well by the common law, as the law marine. 3 *Keb.* 444. *Stanley v. Ayles.* *Per Hale.*

Mortgage.

After mortgage of a ship, the mortgagee cannot maintain an action of assumpsit for the freight.

For

For till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expences, and he is to reap the profits. *Lord M. Gibbney v. Blackburn*, cited in 1 *H. Black. Rep.*

117.

The captain has a right to retain the goods shipped on board his vessel, till he is paid his freight; if he parts with the possession of them, he must then resort to his contract. In the case of goods consigned, the consignee is the person liable to the freight, not the person to whom he sells them; that would be to advance the price on him, as he must be supposed to buy them at a certain price independent of all charges, unless such charges are made part of the bargain. A right of action cannot be transferred from the person liable to another, by such person's own act. He therefore who is first liable, must remain so. *Artaza v. Smallpiece*. *Lord Keny. Trin. 33 Geo. 3.*

Captain a right to retain goods shipped, till paid.

London, ss. Richard Fenn, late of *London*, yeoman, was attached to answer *John Fenn*, in a plea of trespass on the case, and whereupon the said *John*, by *J. K.* his attorney, complains; For that whereas, the said *Richard*, on the 20th day of October, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 100*l.* of lawful money of *Great Britain*, for the demurrage of a certain vessel called a lighter, of the said *John*, by him the said *Richard* before that time retained and kept, with divers goods, wares, and merchandises, on board thereof, on demurrage, for a long time before then elapsed, and at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested:

And

Quantum meruit. And *wheretas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had, before that time, suffered and permitted the said *Richard* to retain and keep, and that he the said *Richard* had accordingly retained and kept, a certain other vessel of the said *John*, called a lighter, with certain other goods, wares, and merchandises on board thereof, on demurrage, for a long time before then elapsed, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money, as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 100*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, and common conclusion.

Notes.

Demurrage,
what.

Demurrage, or *demurrage*, is an allowance made to the master of a ship by his freighters, for staying longer in a place than the time first appointed for his departure, or his stay at the delivering ports; and is generally inserted in the charter-party to be paid daily as it becomes due; the days are always limited, so that on the expiration thereof, and protests duly made, the master is at liberty to proceed. The price is regulated by the burthen of the ship.

For wharfege of goods wharfed, and landed out of vessels on plaintiff's wharf. *London*, to wit. *John* Denn complains of *Richard* Fenn, being in the custody of the marshal, of the marshalsea, of our lord the new king, before the king himself; For *that wheretas*, the said *Richard*, on the 6th day of *April*, in the year of our Lord

1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *Richard* in 5*l.* of lawful money of *Great Britain*, for the wharfage of divers goods, wares, and merchandises of the said *Richard* before then wharfed and landed; out of certain ships, boats, and other vessels, into and upon a certain wharf of the said *John*, and at the special instance of the said *Richard*, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to *Quantum meruit*, wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had, before that time, wharfed and landed, divers other goods, wares, and merchandises, of the said *Richard*, from and out of certain other ships, boats, and vessels, upon a certain other wharf of the said *John*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 5*l.* of like lawful money, to wit; at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice. Add two counts for work and labor by the plaintiff and his servants, money laid out, and the common conclusion.

Middlesex, to wit. *John Denn* complains of *For the wharfage of goods wharfed, and put on board defendant's vessel.*
Richard Fenn, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself; *For that whereas* the said *Richard*, on the 30th day of *April*, in the year of our Lord 1794,
to

to wit, at *Westminster* in the county aforesaid, was indebted to the said *John* in 50*li* of lawful money of *Great Britain*, for the wharfage, housing, landing, and weighing, of divers goods, wares, and merchandises, before then loaded and put, from and off the wharf of the said *John*, on board a certain ship or vessel of the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested;

Quantum meruit. And whereas, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time wharfed, landed, housed, and weighed, divers other goods, wares, and merchandises, before then loaded and put, from and off the said wharf of the said *John*, on board a certain other ship or vessel of the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 50*li* of like lawful money, to wit at *Westminster* aforesaid, whereof the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice. Add two counts for work done by the plaintiff and his servants, money laid out, and common conclusion.

Notes.

Wharf, what. *Wharf*, is a building raised on the shore for the convenience of landing or discharging a vessel by means of cranes, tackle, capsterns, &c. The fee paid for the landing of goods, or for shipping them off,

off, is called *wharfage*, and the person who has the oversight or direction of the wharf, receives *wharfage*, and is called *wharfinger*. Tho' the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits, when once established; but any person had a right.

4 Inst. 148.
Mad. Hist. Exch.
530.

The rates for *wharfage* and *cranage* of goods, Rates, are to be settled by the king in council, a table of which is to be hung up at every of the wharfs; and if more is demanded, or if the ship be stopped, the penalty is 10*l.* to be recovered with full costs. 22 Car. 2. c. 2. f. 21.

Formerly any person had a right to load or discharge his merchandise in any part of the haven, whereby the revenue was much impaired and diminished, by fraudulent landings. This occasioned the statutes of 1 Eliz. c. 11, and 13 & 14 Car. 2. c. 11. f. 14. which enables the crown, by commission, to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandise.

The crown enabled to ascertain the limits of all ports.

A wharfinger has a *lien* on goods brought to his wharf, for the balance of a general account. Liens are either by the common law, usage, or agreement. Liens by common law, were given where a party was obliged by law to receive goods, &c. in which case, as the law imposed the burden, it also gave the power of retaining, for his indemnity; and a lien from usage is matter of evidence. *Naylor v. Mangley. Hil. 34 Geo. 3.*

Special assumpsit, for wharfage and cranage, brought by plaintiffs as wharfingers, who were the possessors of *Brookes' wharf, London*, against the defendants, who were the consignees of a loading of malt, which was brought in a west-country barge; which barge, was fastened and lay at *Brookes' wharf*, and unloaded a small part of the said cargo upon the said wharf, and whilst she lay fastened, the other part of the cargo was taken out, and put on board lighters, and never landed on the wharf.

Wharfingers in London, are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharfs.

wharf. This question was, Whether the defendants were liable to pay for such part of the cargo as was put on board the lighters, and never landed on the wharf, according to the rates mentioned in an order of council, dated 1st March, 1764, made in pursuance of stat. 22 Car. 2. c. 11. sect. 21. by which malt is rated at 6d. per score? *Lord Mansfield*. A duty for wharfage and cranage cannot be due, where the party has not had the use of the wharf, or the crane. *Wharfage* is due for landing on the wharfs, and *cranage* for the assistance of the crane. *Anchorage* or *moorage*, are very different things. If any injury has been done by lying before the wharf, or by fastening the vessel to it without right, or in any other way whatsoever, the plaintiffs may have their remedy in another way, but not under this act. *We are all of opinion*, that the plaintiffs are not entitled to recover the wharfage or cranage duty, for such part of the goods as were not unloaded upon their wharf. Nonsuit entered. *Lord M.* further said, if a vessel should colorably come, and lie before the wharf, or moor, or fasten to it, without intention of loading or unloading upon it, or if it stays there longer than the act permits, which expressly prohibits the staying longer (without the consent and permission of the wharfingers) than is necessary to load and unload. And this colorable coming thither, with an unfair intention, must depend upon circumstances, and is a matter of fact to be tried by a jury; an action upon the case will lie for it, and a jury will consider it in damages. *Stephen and an. v. Coster and an.* 3 Burr. 1408.

Wharfage and
cranage.

Stat. 45.

For the mooring
of vessels.

London, to wit. *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, in a plea of trespass on the case, and whereupon the said *John*, by *J. C.* his attorney, complains, For that whereas, the said *Richard*, on the 20th day of *October*, in the year of our Lord 1794. to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said

John, in 60*l.* of lawful money of Great Britain, for the mooring and fastening of a certain ship or vessel of the said *Richard*, (a) (*called the Juno*), to (a) *Not necessary.* a certain chain of the said *John*, lying and being in the river *Thames*, before then, and for a long space of time (b) (*to wit, for the space of 20 days*), (b) *Not necessary.* before then elapsed, moored and fastened by the said *Richard*, to the said chain of the said *John*, and by his permission and sufferance, at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to *Quantum meruit.* wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time suffered and permitted the said *Richard* to moor and fasten, a certain other ship or vessel (c) (*called the Juno*), to (c) *Not necessary.* a certain other chain of the said *John*, then being in the river *Thames* aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid; and that the said *Richard*, by virtue of such permission and sufferance, had before then moored and fastened the said ship or vessel to the said chain there, for a long space of time, (d) (*to wit, for the space of other 20 (d) Not necessary. days*), then elapsed, he, the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and

Declarations in Assumpsit.

and year aforesaid, there had notice. Add money laid out, and common conclusion.

Notes.

Mooring, what. *Mooring*, is the art of confining and securing a ship in a particular station by *chains or cables*, which are either fastened to the adjacent shore, or to anchors in the bottom.

The mayor of *London*, for the time being, hath the conservation and rule of the water and river of the *Thames*; and the issues, breaches, and lands overflown, from the bridges of *Staines*, unto the water of *Tendall* and *Medway*. Stat. 4 H. 7. c. 15.

27 H. 8. c. 18. In the river *Thames*, there are several piles or posts forced in the river, for the purpose of mooring of craft and vessels. The committee of navigation grant leave to persons to drive these piles in the river, for which they pay an acknowledgment to the chamber of the city of *London*: and they are frequently let to bargemasters, and owners of craft, to fasten their barges to, at a certain rent. I am informed Sir *Peter Burrell* has a claim; under a grant of the crown, for the mooring of ships and vessels in some part of the river, below bridge; there is also a fee taken of ships for the pool of the haven, where they cast anchor, to the king's officer, by a patent.

For work done as a barge-master. C. P.

London, to wit. *Richard Fenn*, late of *London*, yeoman, was attached to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John*, by *J. K.* his attorney, complains, For that whereas the said *Richard*, on the 20th day of *August*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John*, in 50*l.* of lawful money of *Great Britain*, for the carriage of divers goods, wares, and merchandises, by the said *John*,

John, before that time, carried and conveyed in certain barges, boats, and other vessels of the said *John*, for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas, Quantum meruit,* afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time carried and conveyed, divers other goods, wares, and merchandises of the said *Richard*, and for the said *Richard*, in certain other barges, boats, and other vessels of the said *John*, for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard*, should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. Some pleaders add two counts for work and labor by plaintiff and his servants, but I do not see the necessity for them, especially as there are stated prices fixed for the carriage of goods from and to different places; but add a count *for money paid*, (an *insimul computasset*, if necessary,) and the common conclusion.

London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 20th day of *September*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the

For the carriage
of goods by a
common carrier.

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the parish of *St. Mary-le-Bow* in the ward of *Cheap*, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the carriage of divers goods, wares, and merchandises of the said *Richard*, by the said *John* before that time carried and conveyed in certain waggon, carts, and other carriages of the said *John*, from *Huntingdon*, in the county of *Huntingdon*, to *London* aforesaid, at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time carried and conveyed, divers other goods, wares, and merchandises of the said *Richard*, and for the said *Richard*, in certain other waggon, carts, and other carriages of the said *John*, from *Huntingdon* aforesaid, to *London* aforesaid, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Special pleaders usually add two counts for work and labor generally, which, I think, unnecessary. Add a count for money laid out, (*an insinuat computasset*, if necessary,) and common conclusion.

All persons carrying goods for hire come under the denomination of common carriers; and if they refuse

refuse to carry goods, having convenience, an action will lie against them. 2 *Show.* 327. And all carriers are bound to deliver goods, to the person to whom directed. *Alleyn*, 93. *Owen*, 57. If money or goods be delivered to a common carrier, he is under a contract in law, to pay or carry them to the person appointed. 12 *Mod.* 482.

If goods be given to a waggoner on the road, and ready to be received on the waggoner's arrival, in this case *Eyre*, C. J. held, There being no entry made of them in the books, nor warehouse-room occupied, that the defendant was not liable to more than the bare carriage. *Lambert v. Robinson*, *Hil.* 33 *Geo.* 3.

Bedfordshire, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshal's office, of our lord the now king, before the king himself, For that whereas the said *Richard*, on the 10th day of September, in the year of our Lord 1794, to wit, at *Bedford*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of Great Britain, for meat, drink, washing, lodging, and other necessaries, by the said *John* before that time found and provided for the said *Richard*, at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Bedford* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, afterwards, to wit, on the same day and year aforesaid, at *Bedford* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time found and provided for the said *Richard* other meat, drink, washing, lodging, and other necessaries, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and

For meat, drink,
washing, and
lodging.

Quantum meruit.

Declarations in Assumpsit.

the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit at *Bedford* aforesaid, whereof the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice.

Add a count for money laid out, (and an *in simul computasset*, if the account has been stated and settled,) with common conclusion.

Assumpsit, that he had found sufficient meat for divers months, held good.

Assumpsit, for that in consideration he had found the defendant sufficient meat for *divers months last past*, he promised to pay him as much as he deserved. In arrest of judgment, it was said, the declaration was short and uncertain *as to the time and number of months*; but adjudged, that the uncertainty as to the time; can do no more hurt, than the uncertainty as to the things, which has often been adjudged not to vitiate, and that it is sufficient to aver how much he deserved. *Salk. 557. pl. 1. Snow v. Firebush, 12 Mod. 434.*

For board and necessities found for the defendant's son, in C. P.

Essay, to wit. *Richard Fenn*, late of *Chelmsford*, in the said county, yeoman, was attached to answer *John Denn*, in a plea of trespass on the case; and whereupon the said *John*, by *J. B.* his attorney, complains, *For that whereas*, the said *Richard*, on the 10th day of *September*, in the year of our Lord 1794, to wit, at *Chelmsford*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for meat, drink, washing, lodging, and other necessities, by the said *John* before that time found and provided for one *Thomas Fenn*, the infant son of the said *Richard*, at the special instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Chelmsford* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereunto afterwards requested:

Quantum meruit. And whereas, afterwards to wit, on the same day and year aforesaid, at *Chelmsford* aforesaid, in consideration that the said *John*, at the like request of the

the said *Richard*, had before that time found and provided for the said *Thomas Penn*, the infant son of the said *Richard*, other meat, drink, washing, lodging, and other necessities, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *Chelmsford* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. *Add money laid out, and common conclusion.*

N. B. I take it, that if the child's name be not known, stating it, without the name, as the infant son of defendant, will be sufficient.

This declaration will also serve for necessities found for any one else, at the request of the defendant.

Notes.

The duty of parents to provide for the maintenance of their children is a principle of natural law, an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life, which they have bestowed, shall be supported and preserved; and thus the children will have a perfect right of receiving maintenance from their parents. *Puff. L. N. b. 4. c. 11.*

No person is bound to provide a maintenance for his issue, unless where the children are impotent, and unable to work, either *through infancy, disease, or accident*; and then is only obliged to find them with necessities. For the policy of our

Declarations in Assumpsit.

laws, which are over-watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to provide them with superfluities, and other indulgences of fortune, imagining they might trust to the impulse of nature, if the children were deserving of such favors.

This action will not lie, unless the *father or mother* put out the *child to nurse*; and in that case, the law implies a promise to pay, for which *indebitatus assumpsit* will lie. 6 *Mod.* 77.

In case physic be administered to the child whilst at nurse, the *father* must pay for it, *if absolutely necessary*, altho' he does not give the order. 2 *Ld. Ray.* 841. 7 *Mod.* 148.

For a third person.

Indebitatus assumpsit for drink and lodging, found for a *third person*, at the request of defendant; it was moved in arrest of judgment, it would not lie, but it ought to have been a special action on the case. But the court held, that it lies against him upon the contract, and the plaintiff had judgment. 6 *Mod.* 77. 2 *Ld. Raym.* 982. 3 *Bulstr.* 31. *Roll. Rep.* 173. pl. 6.

For the use and occupation of a house,

This is a transitory action, and the venue may be laid in any county.

Huntingdonshire, ss. John Denn complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas*, the said *Richard*, on the 1st day of *August*, in the year of our Lord 1794, to wit, at *St. Neots*, in the said county, was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the use and occupation of a certain messuage or tenement (a) *of the said John*, situate and being in *St. Neots* aforesaid, in the county aforesaid, by him the said *Richard*, and at his request, and by the permission of the said *John*, for a long time (b) *(to wit, for the space of half a year)* before then elapsed, had, held, used, occupied, possessed, and enjoyed; and being so indebted, he

(a) Not absolutely necessary.

(b) This may be left out, if the time be not known.

the

the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *St. Neots* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day *Quantum meruit.* and year aforesaid, at *St. Neots* aforesaid, in the said county, in consideration that the said *John*, at the like request of the said *Richard*, had before that time permitted the said *Richard* to have, hold, use, occupy, possess, and enjoy a certain other messuage or tenement (a) of him the said *John*, situate and being in *St. Neots* aforesaid, in the said county; and that the said *Richard*, according to that permission, had, held, used, occupied, possessed, and enjoyed the same, for a long time (b) (to wit, for the space of half a year) before then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *St. Neots* aforesaid, in the county aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Some add a count for money paid, but I see no reason for that; the common conclusion will be sufficient, unless where rent has been in arrear for several quarters, and an account stated and settled; in that case, add an *insimul computasset*, and common conclusion.

Was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the use and occupation of certain rooms and apartments, to wit, two rooms in, and part and parcel of, a certain messuage or tenement of the said *John*, situate in

For use and occupation of rooms.

(a) Not absolutely necessary.

(b) Not necessary.

Declarations in Assumpsit.

Old Street, in the parish of *St. Luke*, in the said county of *Middlesex*, by him the said *Richard*, and at his request, and by the permission of the said *John*, for a long time (a) (to wit, for the space of six weeks) before then elapsed, had, held, used, occupied, possessed, and enjoyed; and being so indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c. as in last precedent (b).

Quantum meruit
thereon.

And whereas, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time permitted the said *Richard* to have, hold, use, occupy, possess, and enjoy, certain other rooms and apartments, to wit, two other rooms in, and part and parcel of, a certain other messuage of tenement of the said *John*, situate in *Old Street* aforesaid; and that the said *Richard*, according to that permission, had, held, used, occupied, possessed, and enjoyed the same, for a long time (to wit, for the space of six weeks) before then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, &c.

For ready-furnished lodgings.

Was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the use and occupation of certain ready-furnished lodgings of the said *John*, by him the said *Richard*, and at his request, and by the sufferance and permission of the said *John*, for a long time before then elapsed, had, held, used, occupied, possessed, and enjoyed; and being so indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c. And whereas, afterwards, to wit, on, &c. at, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time suffered and permitted the said *Richard* to have, hold, use,

Quantum meruit.

(a) Not material.

(b) If a woman takes rooms for prostitution, and the landlord knows it, the action will not lie, being *contra bonos mores*. *Girardey v. Richards*, *Sus. E. T.* 1793.

occupy,

occupy, possess, and enjoy, certain other ready-furnished lodgings of him the said *John*; and that he the said *Richard*, according to that permission, had, held, used, occupied, possessed, and enjoyed the same, for a long space of time before then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, &c.

For the use and occupation of divers, to wit, 100 acres of land, situate and being in the parish of *A.*, in the said county, by him the said *Richard*, and at his request, and by the permission of the said *John*, for a long time, before then elapsed, had, held, used, occupied, possessed, and enjoyed; and being so indebted, &c.

In consideration, that the said *John*, at the like request of the said *Richard*, had before that time permitted the said *Richard* to have, hold, use, occupy, possess, and enjoy 100 other acres of land, situate in the parish aforesaid, in the county aforesaid; and that the said *Richard*, according to that permission, had, held, used, occupied, possessed, and enjoyed the same, for a long time before then elapsed; he the said *Richard*, then and there undertook, &c.

Notes.

Rent is a sum which the tenant renders out of the profits of lands or tenements which he enjoys, and is regularly due and payable upon the land from whence it issues, if no place is mentioned in the reservation. *Co. Lit.* 142.

The action for *use and occupation* is given by the stat. 11 Geo. 2. c. 19. sect. 14., which enacts, That where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the tenements occupied by the defendant in an action on the case, for the *use and occupation*; and if, in evidence, any *parol demise*, or any agreement (not being by deed), whereon a certain rent is reserved,

For the use and occupation of land.

Quantum meruit.

Rent, what.

Use and occupation may be maintained for rent, if the contract be not by deed.

Tenant for life dies, executor may recover in this action.

served, do appear, the plaintiff shall not therefore be nonsuited, but may make use thereof, as an evidence, of the *quantum of the damages* to be recovered. And if tenant for life dies *before or on the day* on which any rent was made payable, upon any lease which determined on the death of such tenant for life, his executors may, in this action, recover against the under-tenant the whole, or a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, in which the said rent was growing due.

At common law it was holden, that assumpsit would lie for rent on an *express* promise, but not upon an *implied* promise; and such express promise must have been made at the same time with the lease. 3 *Lev.* 150.

An assumpsit will lie on an express promise, and where the reservation is of a sum in gross. *Hard.* 61. 4 *Mod.* 78. *Noy* 60.

Tenant in tail dies:

If tenant in tail die a week before the rent become due, without issue, his executor will be entitled to an apportionment. *Paget v. Gee*, 1 *Burn's Just.* 471. Tenant for years determinable on lives, is within the mischief of the statute. So where a wife had an annuity as a separate maintenance payable quarterly, and died in the middle of the quarter, it was held, the annuity should be apportioned. 2 *Black. Rep.* 1016. *Howell v. Stanforth*.

Executor cannot add a count in his own right, with a debt due to the testator. 1 *Wils.* 171.

Executor brought an action for rent due to his testator in his time, and for other rent in his own time; and there was a *quantum meruit* for the rent of another messuage, in which he had not declared as executor.—Judgment by default, and on inquiry executed, error brought, and judgment reversed, because the demands were incompatible. *Str.* 1271. Mr. J. Buller says, But perhaps it would have been helped by a verdict; because, for rent due in his own time, he need not declare as executor, and therefore if it had been tried, the judge ought not

to have permitted him to prove rent due to himself, in his own right. *Bull. Ni. Pri.* 136.

In case for use and occupation of an house by permission of the plaintiff, the defendant pleaded *Nil habuit in tenementis* not a good plea in an action for use and occupation. *Nil habuit in tenementis*, and on demurrer, held no good plea, as it would be upon a lease at common law; because, there an interest is supposed to have passed from the lessor, but here the court must take it, that there was an express promise, and therefore, if the plaintiff had an equitable title, or no title at all, yet, if the defendant have enjoyed by permission of the plaintiff, it is sufficient, and it is not necessary for the plaintiff to say it is *his house*, any more than in assumpsit for goods sold, to say *they were the goods of the plaintiff*. *Lewis v. Wallace*, *H. 25 G. 2. K. B. Bull.* 136. *to say to Mod.* 331.

Action for use and occupation. There was an agreement in writing, whereby it was agreed, that a lease should be let by plaintiff to Gamage for 21 years at 26*l.* per ann. to commence from Michaelmas then next. Gamage died, and made Merceau executor, who paid 26*l.* in court. On trial, plaintiff offered to shew, by *parol evidence*, that, besides the 26*l.* per ann., defendant had agreed to pay 2*l.* 12*s.* 6*d.* a-year for ground rent, to ground-landlord; but no evidence was offered, of the actual payment of said ground-rent during testator's life, without which, *De Grey, C. J.* thought it inadmissible, and nonsuited plaintiff.—Motion to set aside nonsuit. *3 Atk.* 388. cited. The court held the nonsuit right, and said, Courts should be very cautious in admitting any evidence to supply or explain written agreements; else the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters, it might be otherwise. He might shew who is to put the house in repair, or the like, concerning which nothing

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nothing is said ; but he cannot, by parol evidence, shorten the term to 14, or extend it to 25 years, or make the rent other than 26l. *Rule discharged. Preston v. Mercuau, 2 Black. Rep. 1249.*

Use and occupation of glebe lands cannot give in evidence *simony.*

ACTION for use and occupation of glebe lands. The former incumbent had let some of the glebe lands to defendant, who had continued tenant to the present incumbent the plaintiff, and paid him half a year's rent for same. This action was brought for some arrears of rent; defendant offered to give evidence of plaintiff's having been *simonically* presented, of which defendant was ignorant when he paid former rent. C. J. refused the evidence, being of opinion, that the case fell within the common rule, *that a tenant should not be permitted to impeach his landlord's title in an action for the use and occupation. Verdict for plaintiff.* On motion to set it aside, the court held, that, in an action for use and occupation, it ought not to be permitted to a tenant, who occupies land by the licence of another, to call upon that other, to shew the title under which he let the land. Here the defendant, who occupied the land, did so by the permission of the plaintiff, and then refused to pay his rent, under an idea, that he might contest the plaintiff's right; but the plaintiff could not be supposed to come to trial prepared to meet such a defence, and to make out his title. Such an action as the present does not involve the question of title. Rule refused. *Cooke v. Loxley, 5 Term Rep. 4.*

When this action will not lie.

A woman of the town took lodgings, the plaintiff was *at the time* informed of her mode of life, and consented that she should be at liberty to receive male visitors for the purpose of prostitution. In an action for the rent, Lord K. held it not maintainable, the contract being *contra bonos mores.* *Girardy v. Richardson, E. S. 1793.*

Of the several sorts of rents.

There are at common law three manner of rents; *rent-service, rent-charge, and rent-seck.* *Rent-service*, because it hath some corporeal service incident to it, as, at the least, fealty, or the feudal oath

oath of fidelity, *Co. Lit.* 142.; for if a tenant holds his lands by fealty, and 10s. rent, or by the service of ploughing the lord's land, and 5s. rent, these pecuniary rents being connected with personal services, are therefore called *rent-service*, which may be distrained for of common right. *Señ.* 215.

A *rent-charge*, is where the owner of the rent *Rent-charge.* hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distress for same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore called a *rent-charge*, because, in this manner, the land is charged with a distress for payment of it. *Ibid.* 143.

Rent-sock, *redditus fucus*, or barren rent, is, in *Rent-sock.* effect, nothing more than a rent reserved by deed, but without any clause of distress.

There are other rents reducible to these three. *Rent of assize.* Rents of *assize* are the established rents of the freeholders and ancient copyholders of a manor, 2 *Inst.* 19., which cannot be departed from or varied. Those of the freeholders are frequently called *chief rents*, *reditus capitales*; and both sorts are indifferently denominated *quit rents*, *quieti redditus*, because thereby the tenant goes quit and free of all other services. *Ibid.* *Rack-rent* is only a *Rack-rent.* rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation. *Co. Lit.* 143.

The plaintiff, the grantee of an annuity, charged on estate of which defendant was a yearly tenant, cannot support the action for use and occupation, where he has brought an ejectment for non-payment of the rent, and recovered possession; for, by bringing the ejectment, the plaintiff had from that

The grantee of an annuity may support this action, but not if he brings an ejectment for the rent and recovers.

that time, considered the defendant as a trespasser, his title tortious, and so no contract implied, tho' he might recover for the time, *before the ejectment brought.* *Birch v. Wright*, 1 Term Rep. 376.

It may be supported by a tenant against his under-tenant.

A tenant at will demised over to another; it was held, he might maintain this action, for there was a contract between the tenant at will, and the defendant, and as he had enjoyed the benefit of his contract, the action can be supported. *Atkinson v. Pierpoint* 1775, per Denison, J. Bull. N. P.

Payment of rent 19 years, defendant cannot set up title in another;

Where there has been payment of rent by defendant for 19 years, the defendant shall not set up a title in another to defeat the plaintiff. Nor will defendant be liable to *two actions* for the rent, by the persons having different titles; for, tho' another has title, yet he cannot bring an action for the rent till he has made an entry, and recovered in ejectment; and then it must be trespass for the same profits. *Morgan v. Ambrose*, per Wilmot, J. 1756. But tho' defendant could not controvert the title, yet Mr. J. Wilmot agreed, that he might give evidence to explain the holding under him, as that he was executor during the minority of A., and that his interest was then determined; for that admits the plaintiff's title, during the time defendant held under him.

But he may shew plaintiff's interest determined.

Double rent.

Tenant by parol demise from year to year is within 11 Geo. 2. c. 19., and subject to pay double rent if he does not quit after notice given. 3 Burr. 1603. If tenant gives notice that he will quit, it is sufficient, and subjects him to double rent if he does not. *Ibid.* *Timmins v. Rowlinson*.

When lease is expired, tenant's responsibility at an end.

When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable, for the lessor is entitled to receive the *absolute possession* at the end of the term; and an action will lie for the use and occupation after the lease expired, against the original lessee.

But if the lessor has accepted the under-tenant as his tenant, as by his having accepted the key from

from his original lessee, while the under-tenant is in possession, or rent from the under-tenant, it will discharge the original lessee.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that whereas, the use of a warehouse for the stowage of goods, &c. the said *Richard*, on the 6th day of *October*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for warehouse-room and stowage, of divers goods, wares, and merchandises of the said *Richard*, before then found and provided by the said *John*, for the said goods, wares, and merchandises of the said *Richard*, at the special instance and request of the said *Richard*, in certain warehouses of the said *John*, situate in *Northumberland-street*, in the said county, for a long time before then elapsed; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, the said *Richard*, *Quantum meruit.* afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time, found and provided for the said *Richard* other warehouse-room and stowage, for divers other goods, wares, and merchandises of the said *Richard*, in certain other warehouses of the said *John*, situate in *Northumberland-street* aforesaid, in the said county, for a long time before then elapsed, he the said *Richard*, then and there undertook, &c. Add a count for money paid, and the common conclusion.

London, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of occupation of a house by a third person at defendant's request. the said *Richard*, on the 10th day of *July*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted

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indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the use and occupation of a messuage or dwelling-house, with the appurtenances, of the said *John*, situate in *Chesepide*, in *London* aforesaid, by one *John Moore*, at the special instance and request of the said *Richard*, and by the permission of the said *John*, for a long time before then elapsed, had, held, used, occupied, possessed, and enjoyed; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be

Quantum meruit.

thereto afterwards requested: And whereas, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*; at the like request of the said *Richard*, had before that time, permitted and suffered the said *John Moore* to have, hold, use, occupy, possess, and enjoy a certain other messuage or dwelling-house of the said *John*, with the appurtenances, situate and being in *Chesepide* aforesaid; and that he the said *John Moore* had, according to that permission, held, used, occupied, possessed, and enjoyed the same, for a long time before then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have; when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 20*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, when of the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice. And the common conclusion:

~~Surry~~, to wit. *John Denn* complains of *Richard* For horse meat, *Reas*, being in the custody of the marshal, of the *stabling*, and at-
~~marshal~~, of our lord the now king, before the *tendance*.
king himself, *For that whereas*, the said *Richard*,
on the 10th day of *September*, in the year of our
lord. 1794, to wit, at *Guildford*, in the said
county, was indebted to the said *John* in 20*l.* of
lawful money of *Great Britain*, for horse meat,
stabling, care and attendance, by the said *John*
before that time found, provided, and bestowed,
for in and about the feeding and keeping of divers
horses, mares, and geldings, of the said *Richard*,
and for the said *Richard*, and at his special instance
and request; and being so indebted, he the said
Richard, in consideration thereof, afterwards, to
wit, on the same day and year afore said, at *Guild-*
ford afore said, undertook, and faithfully promised
the said *John*, to pay him the said sum of money,
when he should be thereto afterwards requested:
And whereas, afterwards, to wit, on the same day *Quantum meriti*,
and year afore said, at *Guildford* afore said, in con-
sideration that the said *John*, at the like request of
the said *Richard*, had before that time found, pro-
vided, and bestowed, other horse meat, *stabling*,
care and attendance, for in and about the feeding
and keeping of divers other horses, mares, and
geldings, of the said *Richard*, and for the said
Richard, he the said *Richard*, then and there under-
took, and faithfully promised the said *John*, to pay
him so much money as he therefore reasonably de-
served to have, when he the said *Richard* should
be thereto afterwards requested; and the said *John*
swears, that he therefore reasonably deserved to
have of the said *Richard* other 20*l.* of like lawful
money, to wit, at *Guildford* afore said, whereof
the said *Richard* afterwards to wit, on the same
day and year afore said, there had notice. *Add a*
count for money paid, and common conclusion.

N. B. I have seen many declarations of this
sort, where two counts for work and labor by the
plaintiff and his servants, and goods sold and deli-
vered, have been added; but there is no necessity for them,

the whole of such a bill may be recovered under the above declaration : but if there has been an account stated and settled, then add an *in simul computasset*.

For the agist-
ment of cattle.

Kent, to wit. *Richard Roe*, late of *Maidstone*, in the said county, yeoman, was attached to answer *John Doe* in a plea of trespass on the case; and whereupon the said *John*, by *J. S.* his attorney, complains, *For that whereas*, the said *Richard*, on the 20th day of *October*, in the year of our Lord 1794, to wit, at *Maidstone*, in the said county, was indebted to the said *John* in 40*l.* of lawful money of *Great Britain*, for the agisting, feeding, keeping, and depasturing, of divers cattle of the said *Richard*, by the said *John* before that time agisted, fed, kept, and depastured, in the lands and pastures of the said *John*, for a long time then elapsed, for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard* undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, which he should be thereto afterwards requested.

Quantum meruit.

And whereas, afterwards to wit, on the same day and year aforesaid, at *Maidstone* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time agisted, fed, kept, and depastured, in the lands and pastures of the said *John*, divers other cattle of the said *Richard*, for a long time then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* and other 20*l.* of like lawful money, to wit, at *Maidstone* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money laid out, and common conclusion. *N. B.* Some add two counts for work and labor, but where is the necessity? The debt arises by the feeding on the land, and not by any work done.

Nota.

Notes.

Agistment, is where other men's cattle are taken into any ground at a certain rate per week. Sheep are taken in by the score, so are oxen per day. It is so called, because the cattle are suffered *agister*, that is, to be *levant* and *couchant* there; and many great farms are employed to this purpose. *Agistment*, is likewise the profit of such feeding in a ground or field, and extends to the depasturing of barren cattle of the owner, for which tithes shall be paid to the parson.

If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract, to return them on demand to the owner. *Civ. Car.* 271.

If A. takes a gelding to pasture, and the gelding be stolen, no action lies against A., unless he had made a *special assumpsit* to deliver him; for the undertaking of A. is to feed the gelding in the fields and in the open air, and not to keep him safely, as an hostler is obliged to do in his stable; and the law will not stretch men's promises beyond their first undertaking. *Moor.* 543. 1 *Bacon's Akr.* 243.

If in an *indebitatus assumpsit* the plaintiff declares, that the defendant was indebted to the plaintiff in 20*l.* for the feeding and agistment of beasts, and for wheat et aliis mercimoniis per prædicta, the defendant *habet et recept'*. This is a good declaration, for tho' it be not sufficient to say that he was indebted generally, because that may be for rent upon leases, or debts upon specialties, yet this is certain enough, for as well the wares and merchandises, as the pasturing and wheat, are personal things, for which an assumpsit may be brought. *Hob.* 5. *Vide Roll. Rep.* S. C.

If A. puts his beasts into B.'s pasture, on an agreement to pay B. 6*d.* per week for the pasturage,

X 2

B. can-

B. cannot retain the beasts of *A.* until he hath paid him the money, unless this were at first provided by their agreement; but the only remedy that *B.* has, is upon the contract. *Gre. Car.* 271.
2 *Rul. Abr.* 92.

For the hire of
horses.

Yorkshire, ff. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas, the said Richard*, on the 10th day of *October*, in the year of our Lord 1794, to wit, at *Doncaster*, in the said county, was indebted to the said *John* in 40*l.* of lawful money of *Great Britain*, for the hire of divers horses, mares, and geldings, (a) of the said *John*, by him the said *John* before that time let to hire to the said *Richard*, and at his special instance and request, and by him the said *Richard*, according to that letting to hire, had and used; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Doncaster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas, afterwards, to wit, on the same day and year aforesaid, at Doncaster* aforesaid, in consideration that the said *John*, at the like instance and request of the said *Richard*, had before that time let to hire to the said *Richard* divers other horses, mares, and geldings, (b) of the said *John*, and that the said *Richard*, according to that letting to hire, had and used the same; he the said *Richard* undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 40*l.* of like lawful money, to wit, at *Doncaster* aforesaid, whereof the said *Richard* after-

(a) Not material.

(b) Not material, unless the fact be so, wards,

winds, to wit, on the same day and year aforesaid, there had notice. Add a count for money laid out, and common conclusion.

Notes.

Hiring and borrowing are contracts by which a qualified property may be transferred to the hirer or borrower, in which there is only this difference: that hiring is always for a price, a stipend, or additional recompence; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession, and a transient property, is transferred for a particular time or use, *on condition and agreement to restore the goods so hired or borrowed, as soon as the time is expired, or use performed; together with the price or stipend (in case of hiring), either expressly agreed on by the parties, or left to be implied by law, according to the value of the service.* By this mutual contract, the hirer or borrower gains a temporary property in the *thing hired*, accompanied with an implicit condition to use it with moderation, and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus, if a man hires or borrows a horse for a month, he has the possession, and a qualified property therein, during that period; on the expiration of which, his qualified property determines, and the owner becomes (in case of hiring) entitled also to the *premium or price* for which the horse was hired. *Kelv. 172. Cro. Jac. 236.*

If a man lend, or let another his horse, and for want of *fast keeping* he die, the owner may bring an action to repair the damage sustained by the negligence. So if a man lend another his sheep to eat his land, and by the negligence of the borrower they are drowned, an action on the case lies. *5 Cro. 14. Cro. Eliz. 777. 784.* The reason is, that when a man borrows or hires any

thing, and only uses it according to the purpose of the loan, that contract bears him out from all accidents that are consequent upon such usage; for there is no reason why the borrower should not have the use of it according as the owner had licensed and empowered him; and if any unavoidable accident happen upon such a licence, the lender must impute it to the folly of his own permission: but if it happened through the negligence of the borrower, then it is fit he also should answer for that, whereby he becomes injurious to the lender. *Dott. & Stud. 128. b.* If a man lend another a horse and he dies of disease, the borrower is excused.

For the hire of goods.

Was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the hire of divers goods and chattels of the said *John*, by him before that time let to hire to the said *Richard*, and at his special instance and request, and by the said *Richard*, according to that letting to hire, had and used, for a long time then elapsed; and being so indebted, he the said *Richard*, in consideration thereof, &c.

Quantum meruit.

And whereas, afterwards, to wit, on, &c. at, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time let to hire to the said *Richard* divers other goods and chattels of the said *John*, to be used and employed in and about the business of the said *Richard*, and that the said *Richard*, by virtue of that letting to hire, had and used the same, for a long time then elapsed; he the said *Richard*, then and there undertook, &c. Add a count for money laid out, and common conclusion.

For a stone-horse covering a mare.

Middlesex, to wit. *John Denn* complains of *Richard Fenn* esquire, (having privilege of parliament,) of a plea of trespass on the case, for that whereas, the said *Richard*, on the 20th day of September, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, was indebted to the said *John* in 10*l.* of lawful money of *Great Britain*,

Britain, for the use of a certain stone-horse of the said *John*, by the said *Richard* before that time had and used, for in and about the covering of divers mares of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And Quantum meruit.* whereas afterwards to wit, on the said day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time suffered and permitted a certain other stone-horse, of him the said *Richard*, to cover divers other mares of the said *Richard*, and that the said stone-horse of the said *Richard* had accordingly covered the said last-mentioned mares of the said *Richard*; he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 10*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Some add two counts for work done by plaintiff and his horses, and money laid out; but as the debt arises for the *leap only*, I see no reason to enlarge the declaration by adding unnecessary counts, which, in every case, should be avoided. Add the common conclusion.

N. B. There is usually an agreed price between the parties for the leap; therefore the plaintiff will recover on proof of that sum agreed on, which will be on the first count.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, For the use and occupation of a seat in a pew, in of the church.

of the *minstrel*, of our Lord the now king, before the king himself, *Richard* whereas, the said *Richard*, on the 9th day of *September*, in the year of our Lord 1794, to wit, at *Westminster* in the said county, was indebted to the said *John* of lawful money of *Great Britain*, for the use and occupation of a certain pew of the said *John*, in the parish church of *St. Clement Dunes*, in the said county, by the said *Richard* before that time had, used, occupied, possessed, and enjoyed by himself, and divers other persons of his family, every *Sunday and holiday* (a), for a long time then elapsed, for the hearing and attending therein of divine service, performed in the said church, by the permission of the said *John*, and at the special instance and request of the said *Richard*, and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said money, when he should be thereto afterwards requested: And whereas, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time permitted the said *Richard*, and divers other persons of his family, to sit in and use a certain other pew of the said *Richard* in the parish church of *St. Clement Dunes* aforesaid, in the said county, to hear and attend divine service there, and that the said *Richard*, and divers others of his family, had, according to that permission, sat in and used the same, for a long time then elapsed, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* gives, that he therefore reasonably deserved to have

(a) These words do not seem to be at all necessary.

of the said *Richard* other 10*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add the common conclusion.

Notes:

The right to sit in a particular pew of a church arises either from *prescription*, as appurtenant to a messuage, from keeping it in repair, or from a faculty from the ordinary; for in him is the disposition of all the pews (except those claimed by *prescription*). *Subj. Eadem* 221. An uninterrupted possession for 60 years will not give a title, if neither a faculty or *prescription* appears. 1 *Term Rep.* 428. *Stock v. Booth*.

Pews in the church are in nature of heir-looms, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. 12 *Black. Com.* 428; *cit. 2 Infl.* 202. 12 *Rep.* 505.

The disposition of the pews is *prima facie* in the ordinary; and in case of any disturbance in the enjoyment of the pew, the plaintiff must make out his title either against the ordinary, or against a wrong-doer, by shewing his title by *prescription* to the pew, as appurtenant to a messuage, or under a faculty from the ordinary; 1 *Term Rep.* 428. *Stock v. Booth*; and, it seems, an uninterrupted possession of 60 years will not give a title, if neither a faculty or *prescription* appears. *Ibid.* See 1 *Wils.* 326, in an action against a stranger for disturbance.

In the action for the hire of the pew, there does not seem to be any thing more to prove, than the price agreed on for the use of the pew, and that defendant used same in his family. The right cannot in this case be contended; therefore evidence of its being the plaintiff's pew, without the faculty, will, I take it, be sufficient with the above evidence of the agreement for the price to sit therein.

London,

Declarations in *Shamrock*.

For goods bar-
gained and sold.

London, to wit. *John Dean* complains of *Richard Fenn*, being in the custody of the marshal, of the marshal's office, of our lord the now king, before the king himself. *For that whereas*, the said *Richard*, on the 10th day of *September*, in the year of our Lord 1794, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Chapp*, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandises, by the said *John*, before that time bargained and sold to the said *Richard*, and at his special instance and request, and being so indebted, he the said *Richard*, in consideration whereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time bargained and sold to the said *Richard* divers other goods, wares, and merchandises; he the said *Richard*, then and there, undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. *Add a count. for money paid, and common conclusion.* *Vide stat. 29 Car. 2. c. 3.*

For an attorney's
bill.

Middlesex, to wit. *John Day*, gentleman, one of the attorneys of the court of our lord the now king, before the king himself, being, according to the liberties and privileges of the same court, used and

and approved of in the same, from time whereof the memory of man is not to the contrary; present here in court, in his own proper person, complains of *Richard Roe*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, of a plea of trespass on the case, *For that whereas*, the said *Richard*, on the 10th day of *July* 1794; to wit, at *Westminster*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time done, performed, and bestowed for the said *Richard*; as an attorney and solicitor of the said *Richard*, upon the retainer, and at the special instance and request of the said *Richard*; in and about the prosecuting and defending divers suits in law and equity, for the said *Richard*; and for fees due and of right payable to the said *John*, in that respect; and in and about the drawing, making, and engrossing, of divers deeds and writings for the said *Richard*, at his like instance and request; and also for divers journeys and attendances, by the said *John*, before that time taken, made, and performed, in and about the said work, at the like instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Richard* afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, upon the retainer and at the like request of the said *Richard*, had, before that time, done and performed other work and labor, care and diligence, for the said *Richard*, as attorney and solicitor of the said *Richard*, in and about prosecuting and defending of divers other suits in law and equity for the said *Richard*, and in and about drawing, making, and engrossing of

Assumpsit for fees, and not stated in *what* court, yet held good, *Comb.* 337.

Quodcumque *constitit*.

of divers other deeds and writings for the said Richard; and had also taken, made, and performed, divers other journeys and attendances, in and about the said last-mentioned work, at the like request of the said Richard; he the said Richard then and there undertook, and faithfully promised the said John, to pay him so much money as he thereunto reasonably deserved to have, when he the said Richard should be thereto afterwards requested; and the said John avers, that he thereunto reasonably deserved to have of the said Richard, either gold or like lawful money, to wit; at *Westminster* aforesaid, whereof the said Richard, afterwards, to wit, on the same day and year aforesaid, there had notice: *Add a count for money paid, money lent, and an informal compasser, (if an account has been stated and settled,) with the common conclusions.*

This declaration will appear short, when compared with those drawn by pleaders, but it is to be observed, that it comprehends the whole matter as prized in an attorney's bill; for there can be no good reason for the pleaders to make *formality*, by division, when *time* will serve, the whole of which are comprized in the first two counts.

Notes.

Wherever the law has given to any person certain fees or rewards for his employment or trouble, in this action they are recoverable. 2 *Str.* 749. *Salk.* 78. 1730.

Attorney to give in his bill.

Every attorney shall give to his client a true bill of all the charges of suit, subscribed with his own hand and name, before he can charge his client with payment thereof. 3 *Jac.* 116. 7. f. 1. Not shall he be allowed any fee given to any solicitor or counsel, unless he produces a ticket, subscribed with the hand of such solicitor, &c. testifying how much he hath received for his fee.

No action to be commenced until after bill de-

By Stat. 2. Geo. 2. c. 23. f. 22, made perpetual by 30 Geo. 2. c. 19. f. 75; no attorney or solicitor shall

shall commence or maintain any action for fees or delivered one disbursements, at law or equity, till the expiration of one month. *of one month or more, after he shall have delivered to the party, or left for him at his dwelling, a bill of such fees, &c. written in a common hand, and in English, (except law terms and names of writs,) and in words at length, (except times and sums,) and subscribed with his proper hand. The usual abbreviations may be used.* 12 Geo. 2. c. 13. l. 5.

That for the client may have an opportunity of looking into it; before he is run to any expence. *Str. 433. Barnard 28.* This act does not extend to any bill of fees from one attorney to another. *Stat. 12. Geo. 2. c. 13. l. 6.*

If the bill be delivered, tho' defendant promise to pay, and says, *I do not know what to do with it,* and the attorney take it back again, he cannot support an action on such delivery after the month, for it ought to be left with him; it being the intention of the statute, that the client should have time to examine the charges, and take advice on them, if necessary. *Brooks v. Mason. 1 H. Black. Reps. 196.*

It has been holden, that this act does not extend to business done in conveyancing, nor to the executor of an attorney; and it may be given in evidence on the general issue. *Bull. 145. Comb. 344. Cooke's Rep. 58.* Nor does it extend to an administrator. *Barnard 433.* Nor to a special agreement. *2 Barnard 164.* If all the business be done at the sessions, the bill will be referred. *4 Term Rep. 496. Contra, 124.*

If the bill be not referred before trial, the defendant shall not be admitted to question the reasonableness of the items, before a jury. *Dougl. 180. Williams v. Frish.* Nor shall such attorney be put to prove the several items having been actually done, for that is a matter to be inquired of on taxation, not before a jury, and the client's acquiescence, and not applying to have the bill taxed, is an admission both of the business done, and the reason-

reasonableness of the charges. *Philp v. Reedy, Hereford Sum. Ass. 1762; MSS.* But this is restricted, and only means, that every small item need not be proved, but that there must be a foundation laid, by shewing the existence of the cause and business for which the charges were made, and proving the main articles. *P. Baron Smyke, bat Stafford, 1763.*

An attorney cannot make a set-off for fees unless bill be delivered before trial, and in time.

An attorney cannot make a set-off for business done in an action at the suit of his client, unless he deliver his bill in time, so that it may be taxed previous to the trial. *Dougl. 199. Martin v. Winder.* And if the account has been settled between the attorney and client, the bill shall not be taxed as of course. *Dougl. 198. Hooper v. Till.*

Proof.

When an attorney sues *as such, for fees*, he has no occasion to prove himself to be an attorney (either by his admission, or a copy from the roll,) but he having stated himself to be so on record, and the defendant not pleading in abatement, admits that he is an attorney as stated. The usual proofs, 1. The bill delivered and signed, and that which is produced is a true copy. 2. That plaintiff acted as an attorney, the retainer by defendant, which may be done in a variety of ways; as coming to the plaintiff's house or chambers, inquiring after his cause, or that he brought witnesses, or gave instructions, &c. as few attorneys take a warrant of retainer, and the business done in general.

Action for words, proof that plaintiff acted as an attorney, sufficient.

In an action for words spoken of an attorney in his profession, it was held, that he need not prove himself to be an attorney by his admission, or by a copy from the roll of attorneys, proof that he acted as such, is sufficient. *Berryman, one, 69. 4 Term Rep. 366.* And Mr. Justice Buller said, that in actions brought by attorneys for their fees, the proof of his admission, or by a copy from the roll, has never been required. *Ibid.*

Declaration for a professor's bill.

London, to wit. John Denn complains of Richard Penn, being, &c. For that whereas, the said Richard, on the 10th day of October, in the year of

our

our Lord 1794, to wits at London aforesaid, in the parish of Saint Mary-le-Bow, in the ward of Cheap, was indebted to the said John in 50l. of lawful money of Great Britain, for the work and labor, due, diligence, and attendance of the said John, by him the said John, before then done, performed, and bestowed, as the proctor of the said Richard, upon the retainer, and at the special instance and request of the said Richard, in and about the prosecuting and defending divers causes, suits, and businesses, for the said Richard, and for fees due and of right payable from the said Richard to the said John, in that respect; and also in and about the drawing, making, and engrossing, divers writings for the said Richard, at his like request; and also for divers journees and attendances by the said John, before that time taken, made, and performed, in and about the said work and labor, at the like request of the said Richard; and being so indebted, he the said Richard, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, withtook, and faithfully promised the said John, to pay him the said sum of money, when he should be thereto afterwards requested: *And Quantum meruit, ubique;* afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said John, upon the retainer, and at the like request of the said Richard, had before that time done, performed, and bestowed, other his work and labor, care, diligence, and attendance, as the proctor of the said Richard, and upon his retainer, in and about the prosecuting and defending divers other causes, suits, and businesses, for the said Richard, and in and about the drawing, making, and engrossing, of divers writings for the said Richard; and had also, at the like request of the said Richard, taken, made, and performed, divers other journees and attendances, in and about the said last-mentioned work, he the said Richard then and there undertook,

took, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have; when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice. Some add two counts for work done generally, but I see no reason for it; add a count for money paid, and if necessary, money lent, and an *in simul computasset*, with the common conclusion.

Notes.

Proctors, in the *Commons*, are persons skilled in the civil and ecclesiastical laws, who exhibit their proxies, and make themselves parties for their clients to draw up acts and pleadings, prepare causes for sentences, and attend the advocates with the proceedings. They are admitted by the archbishop's fiat.

Libel in the spiritual court for a proctor's fees; motion for a prohibition. Court said, Where there is remedy *at law*, the spiritual court ought not to proceed; and this case depends upon a *contract* and *retainer*, and granted the motion. *Burb.* 170. *Davies v. Williams.* 3 *Keb.* 441.

If for an appeal
to the court of
dal-g. tea.

For the work, &c. bestowed as the proctor of the said *Richard*, upon his retainer, in and about the prosecuting an appeal, from a sentence pronounced by the arches court of the court of *Cantebury*, to the high court of delegates; and in and about other the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and for certain fees due and of right payable from the said *Richard* to the said *John*, in that respect; and being so indebted, &c.

In

In consideration that the said *Richard*, at the like request of the said *John*, had before that time done, performed, and bestowed, other his work and labor, care, diligence, and attendance, as the proprietor of the said *Richard*, and upon his retainer, in and about the prosecuting a certain other appeal from a sentence pronounced by the arches court, of the said court of *Canterbury*, to the said high court of delegates, and in and about other the business of the said *Richard*, and for the said *Richard*, at his like request; he the said *Richard* then and there undertook, &c. Add money paid, and, if necessary, an *in simul computasset*, with the common conclusion.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*, on the 23d day of *April*, in the year of our Lord 1794, at *Westminster*, in the said county, was indebted to the said *John* in 40*l.* of lawful money of *Great Britain*, for the work and labor, care, skill, and diligence, of the said *John*, as a musician and music-master, by the said *John*, before that time, done, performed, and bestowed, in and about the teaching the wife of the said *Richard* music, at the special instance and request of the said *Richard*, and for entrance-money, due and of right payable from the said *Richard* to the said *John*, on that occasion; and for divers journeies and attendances before that time made by the said *John*, on the aforesaid occasion, at the like request of the said *Richard*; he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, afterwards, to wit, on the same day, and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, as a musician and music-master, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his

For teaching of plaintiff's wife music.

Quantum meruit

Declarations in Assumpsit.

work and labor, care, skill, and diligence, in and about the teaching the wife of the said *Richard* music, and had performed and made, divers other journeys and attendances on that occasion, at the like request of the said *Richard*; he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 40*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard*, afterwards to wit, on the day and year aforesaid, there had notice. Add a count for money expended, and common conclusion.

For the sale of
two horses.

Essex, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 18th day of *July*, in the year of our Lord 1794, to wit, at *Chelmsford*, in the said county, was indebted to the said *Richard* in 100*l.* of lawful money of *Great Britain*, for divers (a) *horses, mares, and geldings*, by the said *John*, before that time sold and delivered to the said *Richard*, at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Chelmsford* aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Chelmsford* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard*, divers other (b) *horses, mares,*

*Quantum sol-
dat.*

(a) Sheep and lambs,

(b) Sheep and lambs,

and

and geldings, of him the said *John*, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as they were reasonably worth, at the time of the sale and delivery thereof to the said *Richard*, when he should be thereto afterwards requested; and the said *John* avers, that they were reasonably worth, at the time of the sale and delivery thereof to the said *Richard*, other 100*l.* of like lawful money, to wit, at *Chelmsford* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, and common conclusion.

In all cases for the sale of *cattle*, the *second count* is on a *quantum valebat*, as much as they were worth, at the time of the sale and delivery.

Was indebted to the said *John* in 10*l.* of lawful money of *Great Britain*, for the use and hire of a certain chaise, called a whiskey, and a certain horse of the said *John*, by the said *John*, before that time, let to hire to the said *Richard*, at the special instance and request of the said *Richard*, and by him the said *Richard*, according to that letting to hire, had and used; and being so indebted, &c. undertook, &c.

For the use and hire of a whiskey.

And whereas, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time let to hire to the said *Richard*, a certain other chaise, called a whiskey, and a certain other horse of the said *John*; and that the said *Richard* had, according to that letting to hire, had and used the same, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 10*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard*

Quantum meruit.

Declarations in Assumpsit.

clard, afterwards to wit, on the day and year aforesaid, there had notice. Add a count for money paid, and conclusion.

This precedent may be made use of for the hire of a job-coach, by alledging the hire of *a certain coach, and a pair of horses, of the said plaintiff*; and if for a *post-chaise and horses*, say, *for the hire of a certain post-chaise and certain horses of the said plaintiff*, to wit, two horses, or four horses, as the fact is.

Declaration for a surviving partner for goods sold and delivered.

State the day any time in the life-time of the deceased partner, and after delivery of the goods.

Worcestershire, fl. John Dunn complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 1st day of *August*, in the year of our Lord 1794, to wit, at *Upton*, in the said county, was indebted to the said *John*, and one *Thomas Roe* in his life-time, and whom the said *John* hath survived, in 40*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandises by the said *John* and *Thomas*, in the life-time of the said *Thomas*, before that time sold and delivered to the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Upton* aforesaid, undertook, and then and there faithfully promised the said *John* and *Thomas*, in the life-time of the said *Thomas*, to pay them the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *Upton* aforesaid, in consideration that the said *John* and *Thomas*, in the life-time of the said *Thomas*, at the like special instance and request of the said *Richard*, had before that time sold and delivered to the said *Richard*, divers other goods, wares, and merchandises, he the said *Richard* then and there undertook, and faithfully promised the said *John* and *Thomas*, in the life-time of the said *Thomas*, to pay them so much money as they therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said

said *John* avers, that the said *John* and *Thomas*, in the life-time of the said *Thomas*, therefore reasonably deserved to have of the said *Richard*, other 40*l.* of like lawful money, to wit, at *Upton* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard*, afterwards, to Money paid; wit, on, &c. at, &c. was indebted to the said *John* and *Thomas*, in the life-time of the said *Thomas*, in other 40*l.* of like lawful money, for money by the said *John* and *Thomas* before that time paid, laid out, and expended, to and for the use of the said *Richard*, and at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook, &c. add a count on an *infinisul computasset*: Yet the Breach. said *Richard*, (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John* and *Thomas*, in the life-time of the said *Thomas*, or to either of them, or to the said *John*, since the decease of the said *Thomas*, but he to pay the same, or any part thereof, to the said *John* and *Thomas*, in the life-time of the said *Thomas*, or to the said *John* since the death of the said *Thomas*, or to either of them, hath hitherto wholly refused, and still refuses, to the said *John*, his damage of 40*l.* and therefore he brings his suit, &c. pledges, &c.

Notes.

Partners are where two or more engage or agree Partners, what. to come in, *share and share alike*, to any trade or bargain.

If two or more engage in a joint undertaking, in the way of trade, or enter into copartnership, it is not necessary to provide against survivorship, for by a maxim of the common law, *jus accrescendi inter mercatores locum non habet*; and this is for the benefit of trade and commerce, that the

Not necessary to provide against survivorship.

Declarations in Assumpsit.

fruits of each person's labor and industry should descend to their children and families.

But if two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the survivor cannot join in an action against the factor; for tho' the duty does not survive, yet the remedy does, and therefore, on recovery, he must be accountable to the executor for that. 2 *Salk.* 444. *Lord Ray.* 340.

When all partners should join.

Where there is a partnership demand, *all the partners should join in the action*, for the contract and undertaking is joint; and if one bring the action only, the defendant may take advantage of it at the trial, and nonsuit the plaintiff, for the contract is not the same. But in case of a *tort*, this must be pleaded in abatement. 2 *Sir.* 820. *Leglise v. Cbampante.*

It is said, if one partner be out of the kingdom, and not amenable to the process of the court, the plaintiff may proceed *singly* against the other, 2 *Atk.* 510.

Where money is owing to two partners, and *after the death* of one it is fixed to a third person, the surviving partner may maintain an action for money had and received, in his own right, and not as survivor. 2 *Term Rep.* 476. *Smith v. Barrow.*

One partner may maintain an action for money had and received, against the other, for money received to the *separate use* of the former, and wrongfully carried to the partnership account. 2 *Term Rep.* 476. S. C.

If two are partners as attornies, &c. and one receive money to be laid out on mortgage; the other is answerable for the amount, tho' his partner gave only his separate receipt. *Cawp. Rep.* 814. *Willst v. Chambers.*

When a particular partnership,

Persons may be partners in a particular concern or business, but that, notwithstanding, if they do not appear to the world as partners, it shall not be sufficient to constitute a general partnership, and make them liable in other cases not connected with such

such particular business. *Lord K. De Berkem v. Smith. Trin. Sit. 1793.*

If in point of fact, parties are not partners in trade, yet if one *so* represents himself, and by that means gets credit for goods for the other, both shall be liable. *Ibid.*

In an action for work done against one partner, who pleads in abatement that he was joint owner of the ship with others *named*, who ought to have been sued, and plaintiff replies, that he had undertaken solely to pay part; the plaintiff proved defendant's order and promise to pay, and the defence was, that the work had been *ordered by one W., the master of the ship*, who was also a part owner, and in court ready to prove it. The court ruled, that if defendant would release him, he was a competent witness. *Young v. Bairner, E. T. 34 Geo. 3.*

A debt due to two partners may be set off by the survivor, to an action brought against himself. *Slipper v. Stidstone, 5 Term Rep. 493.* The court said, the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately; and cited *Hancock v. Haywood, 3 Term Rep. 483.*

Devonshire, to wit. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, and one *Thomas Roe*, whom the said *Richard* hath survived, on the (a) 10th day of *July*, in the year of our Lord 1793, to wit, at *Plymouth*, in the said county, were indebted to the said *John*, in 40*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time done, performed, and bestowed, in and about the business of the said *Richard* and *Thomas*, in his life-time, and for the said *Richard* and *Thomas*, in the life-time of the said *Thomas*, and at their special instance

(a) Any day before the death of the defendant *Thomas Roe*.

Declarations in Assumpfit.

and request; and being so indebted, they the said *Richard* and *Thomas*, in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Plymouth* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards re-

Quantum meruit. requested: And whereas, afterwards to wit, on the same day and year aforesaid, at *Plymouth* aforesaid, in consideration that the said *Richard* and *Thomas*, in the life-time of the said *Thomas*, at the like request of the said *John*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard* and *Thomas*, and for the said *Richard* and *Thomas*, they the said *Richard* and *Thomas*, in the life-time of the said *Thomas*, undertook, and then and there faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when they, the said *Richard* and *Thomas*, should be thereunto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* and *Thomas*, in his life time, other 40*l.* of like lawful money, to wit, at *Plymouth* aforesaid, whereof the said *Richard* and *Thomas*, in his life-time, afterwards to wit, on the same day and year aforesaid, there had notice. Add a count for money paid. Yet the said *Richard* and *Thomas*, in his life-time, (altho' often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but the said *Richard* and *Thomas*, in the life-time of the said *Thomas*, and the said *Richard* since the death of the said *Thomas*, to pay the same, or any part thereof, to the said *John*, have hitherto wholly refused, and the said *Richard* doth still refuse so to do, to the said *John* his damage of 40*l.*, and therefore he brings his suit, &c. pledges, &c.

Conclusion.

Notes.

Notes.

As the executor and surviving partner cannot sue for the debts due to the partnership, so the executor and the surviving partner cannot be jointly sued, because the first is to be charged *de bonis testatoris*, and the other, *de bonis propriis*. *Carth.* 170. 2 *Lev.* 228. 3 *Lev.* 290. *Fortesc. Rep.* 181.

To make a person liable as a partner, there must be an agreement to *share in all risques of profit and loss*. *Dougl.* 372. *L. M. Hoare and Dawes.*

In contracts, to make a man liable as a partner, there must either be a contract between him and the ostensible person, to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself. *Hoare v. Dawes.* *Dougl.* 371.

If a partner shares in advantage, he also shares in all disadvantage. In order to constitute a partnership, a communion of profits and loss is essential. The shares must be joint, tho' it is not necessary they should be equal. If the partners be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. *Coope v. Eyre*, 1 *H. Black. Rep.* 48. *Lord Loughborough.*

In actions upon contract, every partner must be made defendant. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. The plaintiff may bring his action against one, and if he plead *not in abatement*, it is a waiver of any objection to say, he had other partners. For that would put the plaintiff to great delay, and expence of a trial; and would be a great injustice by allowing him to be nonsuited. *Rice v. Strutt.* 5 *Burr.* 2043. 2 *Black. Rep.* 947.

But

But not upon a joint bond.

But upon a joint bond, the action cannot be brought against *one* of the obligors only, for the joint contract appears on the face of the declaration. *Hornet v. Moor*, cited in *5 Burr.* 2614., and judgment arrested.

If there be two partners, and one buys goods for both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead, and he survived. *Comb.* 383.

For work done in performing divers journeies for defendant.

Lincolnshire, ss. *John Denn* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 10th day of *September*, in the year of our Lord 1794, to wit, at *Stamford*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John*, before that time, done and performed, in the going and making of divers journeies, and giving his attendance in and about the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Stamford* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *Stamford* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in the going and making divers other journeies, and giving other his attendance, in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *John*,

Quantum meruit.

John, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 50*l.* of like lawful money, to wit, at *Stamford* aforesaid, whereof the said *Richard*, afterwards, to wit, on the same day and year aforesaid, there had notice. Some add two counts for work done generally, but I see no necessity for it, unless it be to *lengthen the declaration*. Add a count for money paid, (an *insimul computasset*, if necessary,) and common conclusion.

London, to wit. *Richard Fenn*, late of, &c. For premiums of yeoman, was attached to answer *John Denn* in a ^{insurance.} plea of trespass on the case; and whereupon the said *John*, by *J. L.* his attorney, complains, *For that whereas*, the said *Richard*, on the 10th day of *October*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary le-Bow*, in the ward of *Chiap*, was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for premiums of insurance, before that time due and payable from him the said *Richard*, to the said *John*, for and upon divers large sums of money, before that time subscribed by the said *John*, upon divers policies of assurance to him the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, &c. Add two counts for *work and labor generally*, money had and received, (and *insimul computasset*, if necessary,) with conclusion.

Notes.

This arises upon a policy of insurance, which is a contract between *A.* and *B.*, that, upon *A.*'s paying a premium equivalent to the hazard run, *B.* will indemnify or insure him against a particular event. And frequently amongst underwriters, these premiums are settled but once or twice a-year.

Assumpsit, for that the defendant was indebted in 20*l.* *pro præmis*, on a policy of assurance, &c.; on demurrer, it was objected, that plaintiff ought to shew a certain consideration, what the premium was, or how it became due: *Sed non allocatur*; for it is as good as an *indeb. ass. pro quodam valaris*, which has been adjudged good. 2 *Lev.* 153.

For the use and
hire of iron
kintlage.

Was indebted to the said *John*, in 50*l.* of lawful money of Great Britain, for the use and hire of divers, to wit, 90 tons of iron kintlage, by the said *John*, before that time, let to hire to the said *Richard*, and at his special instance and request; and by the said *Richard*, according to that letting to hire, had and used, for a long space of time, (a) *(to wit, for the space of 27 months,*) then elapsed, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and therefaithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time let to hire to the said *Richard*, 90 other tons of iron kintlage, of the said *John*, for him the said *Richard* to have and use; and that the said *Richard*, according to that letting to hire, had and used the same, for a long time *(to wit, for the space of other 27 months)* then elapsed, he the said *Richard* then and

Quantum meruit.

(a) The time is not necessary to be stated, if not known.

there

there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 50*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, and the common conclusion.

Was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the use and enjoyment of a certain billiard-table, with the balls and sticks thereunto belonging, of the said *John*, by the said *Richard*, and at his special instance and request, and by the permission of the said *John*, for a long space of time before then elapsed, had used and enjoyed; and being so indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c. *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time permitted and suffered the said *Richard* to have, use, and enjoy, a certain other billiard-table, with the balls and sticks thereto belonging, of the said *John*, and that the said *Richard* had, by virtue of the said last-mentioned permission, used and enjoyed the same, for a long time before then elapsed, he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, &c.

Oxfordshire, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that *whereas*, the said *Richard*, on the 12th day of *August*, in the year of our Lord 1794, to wit, at *Witney*, in the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the use and hire of a certain fulling-mill of the said *John*, there situate,

For the use of a billiard-table.

Quantum meruit.

Declaration for the hire of a fulling-mill, and for clay found by the plaintiff.

situate, by the said *Richard*, and at his special instance and request, and by the sufferance and permission of the said *John*, for divers long spaces of time, before then elapsed, had and used, for and in about the fulling of divers large quantities of cloth, of and for the said *Richard*, and for divers large quantities of clay, by the said *John*, before that time found and provided, for in and about the fulling of the said cloth, and at the like instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c.

Quantum meruit
thereon.

And whereas, afterwards, to wit, on the same day and year aforesaid, at *Winney* aforesaid, in the county aforesaid, in consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time suffered and permitted the said *Richard* to use, and that he the said *Richard* had accordingly used, a certain other fulling-mill, of the said *John*, there situate, for in and about the fulling of divers other large quantities of cloth, of and for the said *Richard*, and also in consideration that the said *John*, at the like request of the said *Richard*, had before that time found and provided divers other large quantities of clay, for in and about the fulling of the said last-mentioned cloth; he the said *Richard* then and there undertook, &c. Add a count for money laid out, and an *in simul computasset*, if necessary, also the common conclusion.

Declaration for
the hire of a
boat or vessel
called a punt.

For the use and hire of a certain boat or vessel called a punt, of him the said *John*, by the said *Richard*, and at his request, and by the permission of the said *John*, for a long space of time then elapsed, had, used, and enjoyed; and being so indebted, &c.

Quantum meruit
thereon.

And whereas, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time, let to hire to the said *Richard*, a certain other boat or vessel, called a punt, for him the said *Richard*, to have, use, and enjoy, and that the

said

said *Richard* had, according to that permission, used; and enjoyed the same, for a long time then elapsed; he the said *Richard* then and there undertook, and faithfully, promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 10*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice. Add a count for money paid, and common conclusion.

London, to wit: John Denn complains of *Richard Fenn*, being, &c. For work done as a factor. *For that whereas*, the said *Richard*, on the 6th day of *March*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *Saint Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 70*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time done, performed, and bestowed, as the *factor*, or *agent*, of and to the said *Richard*, in and about the selling and disposing of divers goods, wares, and merchandises of the said *Richard*; and also in the doing and transacting other the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor,

Declarations in *Assumpsit*.

bor, care and diligence, as the *factor* or *agent* of and to the said *Richard*, in and about the selling and disposing of divers other goods, wares, and merchandises, of the said *Richard*, and in the doing and transacting other the business of the said *Richard*, and for the said *Richard*; he the said *Richard* then and there undertook, and faithfully promised the said *John*, to pay him so much money, as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard*, other 70*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, money lent, and an *in simul computasset*, with the common conclusion.

Notes.

Factors, in commerce, are agents to persons who act and negotiate for merchants by commission. *Factors* are either charged with the buying or the selling of goods, or with both. Those of the first kind are usually established in places of considerable manufactories, or cities of great trade. Their office is to buy up commodities, for merchants residing elsewhere, to see them packed, and send them to the persons for whom they were bought.

Factors of sale.

* *Factors of sale*, are usually fixed in places where there is a great vent. To these, merchants and manufacturers send their goods to be sold for them, according to the price, and other conditions expressed in the orders delivered them.

The wages or allowances for selling, are usually clear of all expences of carriage, exchange; remittances, &c. excepting postage of letters, which are never put to account.

Factors

Factors should strictly observe the orders of their principals, or else they are liable to the damage accruing from the neglect of them. To observe the orders.

When factors have *unlimited commission* to do for their constituents the best they can, they are excusable, tho' their transactions are attended with loss to their principals; but no factor, who has merely a *commission to sell*, &c. for another, is excusable for intrusting another person beyond the usual time allowed in the sale of the commodities which he disposes of; in such a case, he is answerable to the principal out of his own estate. If an unlimited commission be given.

If a factor sells on the *usual trust* to a person of good credit, who afterwards becomes insolvent, he is discharged; but not if the man's credit was bad at the time of sale. A factor should always be punctual in the advices of his transactions, sales, purchases, freights, and draughts by exchange; he should never deviate from the orders he receives in the execution of a commission for purchasing goods, either with respect to price or quality. If goods that are bought are sent to a *different place* from that to which they were ordered, they become the *factor's*, unless the merchant allows them. *Vide 12 Mod. 514, 515. Mal. Lex. Merc. 83.*

A factor, that has only a *bare authority to sell*, cannot trust, but ought to take and receive the money presently on the sale. *1 Bullsr. 104. Malloy 463. sect. 3.* Bare authority.

Every factor of common right is to *sell for ready money*; but if he be a factor in a sort of dealing or trade, where the usage is for factors to *sell on trust*, there, if he sells to a person of good credit at that time, and he after becomes insolvent, the factor is discharged; but otherwise if it be to a *man notoriously discredited at the time of the sale*. But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable; for, in that case, the factor having gone *beyond his authority*, there is no contract created between the vendee and

Declarations in Assumpsit.

and the factor's principal, and such sale is a conversion in the factor; and if it be not in market overt, no property is thereby altered, but trover will also lie against the vendee. So likewise if it be in a market overt, and vendee *knows the factor to sell as factor*. *Per Holt, 12 Mod. 514.*

He has a power to sell and bind his principal.

A factor has only power to sell, and thereby bind his principal; yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, tho' there is the formality of a bill of parcels and a receipt. *Lee C. J. Paterson v. Tass, 2 Str. 1178.*

If he sells at his own risque.

Where, by the usage of the trade, the factor sells the goods *at his own risque*; that is, at all events answerable to the owner, the owner, in such case, cannot arrest the buyer for the money due on the sale, for the factor, not the buyer, is the debtor to the owner of the goods. *Alderton v. Schrimshire, 2 Str. 1182.* recogn. in *Escot v. Milward, Sitt. M. 24 Geo. 3. by Mr. Just. Buller, Esp. L. N. P. 107.*

When a lien on the goods.

A factor has a *lien* on goods consigned to him, not only for incident charges, but as an item of mutual account for the *general balance* due to him, *so long* as he retains the *possession*; but if he *parts with the possession* of the goods, *he parts with his lien*, because it cannot then be retained as an item for the general account. *Kruzer v. Wilcox, Lord Ch. 1 Burr. 494.* cited also in *2 Burr. 936.*

A factor may safely advance money, to save his principal from a failure.

It is no fraud for a *factor, knowing* the circumstances of his principal to be desperate, and *believing* that he must break, unless he can procure credit, to advance money upon his bills *to save him from an immediate failure*; on the contrary, it is honorable, friendly, and a generous act. *No prejudice* can arise but to the *lender* himself; *he* may lose the whole, or the greatest part of the money so advanced, but the *principal's* estate, if he breaks, is by so much a *gainer*; or *some particular creditors*, to whom this money has been *paid*, are *gainers*. If, by this assistance, the principal has the good luck

lock to stand his ground, he, and all his creditors, are benefited; but none of his creditors can suffer by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin. *Foxcroft v. Devonshire*, 2 Burr. 940. Lord Mansfield:

Tho' the purchaser of goods from a factor has a right to pay him the money, yet, when the principal and factor has a dispute, the buyer, with notice of such dispute, has no right to prejudice the title of the principal; therefore a factor, who becomes surety for his principal, has a lien on the price of the goods sold by him, for his principal, to the amount of the sum for which he has become surety. *Drinkwater v. Goodwin*, Cowp. Rep. 253.

Tho' the purchaser has a right to pay the factor, yet, if there be a dispute between him and the principal, the buyer cannot prejudice principal's credit.

A factor who receives cloths, and is authorized to sell them in his own name, but makes the buyer debtor to himself, tho' he is not answerable for the debt, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action to compel the payment; and it would be no defence for the buyer in that action to say, that as between him and the principal (he, the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him. There is no case in law or equity, where a factor, having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands. *Ibid.* 255.

When a factor has a right to receive the money.

A factor has a lien on the price of goods in the hands of the buyer; tho' he has not the actual possession of them, yet, as he has a power of giving a discharge, or bringing an action, he has a right to retain the money in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, tho' he is not in possession. *Ibid.*

Factor has a lien on the price of goods in the hands of the buyer.

Oxfordshire, to wit. The reverend John Denn, clerk, complains of the reverend Richard Fenn, doctor in divinity, being in the custody of the

For a curate of a church against his rector.

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marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Richard*, on the 6th day of *March*, in the year of our Lord 1794, to wit, at *Witney*, in the said county, was indebted to the said *John* in 60*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John*, by him the said *John* before that time, done, performed, and bestowed for the said *Richard*, in and about the business of the said *Richard*, and for the said *Richard*, and at his special instance and request, in readings, preaching, and celebrating divine service in the parochial church of *Witney*, in the said county; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards, to wit, on the same day and year aforesaid, at *Witney* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time, done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*, in readings, preaching, and celebrating divine service in the parochial church of *Witney* aforesaid, in the said county, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money, as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Witney* aforesaid, in the said county, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add a count for money paid, (and an *inssimul computasset*, if necessary) with the common conclusion.

Was

Was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the standing of a certain coach of the said *Richard*; by the said *John* before that time kept and taken care of for the said *Richard*; and at his special instance and request; and being so indebted, &c. undertook, &c.

And whereas, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time kept and taken care of, a certain other coach of the said *Richard*, and for the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore, &c. Add two counts for work and labor generally, and money paid, with common conclusion.

London, to wit. *Richard Fenn*, late of *London*, merchant, was attached to answer *John Dehn*, in a plea of trespass on the case; and whereupon the said *John*, by *E. F.* his attorney, complains, that whereas, the said *Richard*, and one *Abraham Lynch*, (which said *Abraham* has been, and still is, by due course of law outlawed, at the suit of the said *John*,) on the 6th day of *January*, in the year of our Lord 1791, at *London* aforesaid, in the parish of *St. Mary-le-Bow* in the ward of *Cheap*, were indebted to the said *John* in 60*l.* of lawful money of *Great Britain*, for money by the said *John* before that time lent and advanced to the said *Richard* and *Abraham*, who, &c. at their special instance and request; and being so indebted, they the said *Richard* and *Abraham*, who, &c. in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: Yet the said *Richard* Breach, and

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and *Abraham* who, &c. (altho' often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*, but to pay the same, or any part thereof to the said *John*, have, and each of them hath, hitherto wholly refused, and the said *Richard* still refuses, to the said *John* his damage of 100*l.*; and therefore he brings his suit, &c.

For salvage of
an anchor, and
cable.

Middiesex, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*, on the 5th day of *October*, in the year of our Lord 1794, to wit, at *Westminster* in the said county, was indebted to the said *John* in 20*l.* of lawful money of *Great Britain*, for the salvage of a certain anchor and cabling, by him the said *John* before that time saved for and delivered to the said *Richard*, and at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time saved for and delivered to the said *Richard* a certain other anchor and cable, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 20*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. Add two counts for work and labor generally, money paid, and common conclusion.

Notes.

Notes.

Salvage money is a recompence allowed, both by *Salvage; what.* the statute and civil law, to such persons as have assisted, in saving merchandises, ships, &c. from perishing in wrecks, or by pirates or enemies. By stat. 2 Ed. 3. c. 13., if any ship be lost on the shore, and the goods come to land, (so as it be not legal wreck,) they shall presently be delivered to the merchants, they paying only a reasonable reward, (formerly a tenth part of the value of the thing saved,) called *Salvage*, to those that preserved them. But, by stat. 12 Ann. c. 18., confirmed by 4 Geo. 1. c. 12., in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea coasts, it is enacted, *That all head officers of towns near the sea, shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100l; and in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices.*

Where goods are saved from fire, when the ship *Saving from* took fire, at the hazard of defendants' lives, if *fire.* trover be brought for them, the defendants may give in evidence, that they detained them till paid for the salvage. *Hartford v. Jones*, 1 *Ld. Ray.* 398.

Salvage is allowed by all nations, it being *Allowed by all* reasonable, that a man shall be rewarded who hazards *nations.* his life in the service of another; but this matter shall be given in evidence. *Ibid.* 393. 2 *Salk.* 654.

London, to wit. John Denn complains of *Ri-* *For the fire of*
chard Fenn, being in the custody of the marshal, of *a ship.*
the marshalsea, of our lord the now king, before
the king himself, *For that whereas*, the said *Ri-*
chard, on the 1st day of *October*, in the year of
our Lord 1794, to wit, at *London* aforesaid, in the
parish of *Saint Mary-le-Bow* in the ward of *Cheap*,

Declarations in Assumpsit.

was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the use and hire of a certain ship or vessel, with the tackle and furniture thereto belonging, called the *Nancy*, of the said *John*, by him the said *John* before that time let to hire, and delivered to the said *Richard*, and at his special instance and request, and by the said *Richard*, according to that letting to hire, had and used, for a long space of time then elapsed; and being so indebted, he the said *Richard*, in consideration thereof, &c. undertook, &c.

Quantum meruit. And whereas, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time let to hire, and delivered to the said *Richard*, a certain other ship or vessel called the *Nancy*, with the tackle and furniture thereto belonging, of the said *John*, to be had and used, and which was accordingly had and used by the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. *Add a count for money paid, and common conclusion.*

For a farrier's bill for shoeing horses, and curing of disorders. *London*, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*, on the 5th day of *March*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *Saint Mary-le-Bow* in the ward of *Cheap*, was indebted to the said *Richard* in 40*l.* of lawful money of *Great Britain*, for the work and labor, care and diligence, of the said *John* as a farrier, in shoeing of divers horses, mares and geldings,

geldings, for the said *Richard*, and at his special instance and request, and for divers materials and other necessary things, before then found, provided, used, and applied by the said *John* in and about that work, at the like request of the said *Richard*, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *John*, at like request of the said *Richard*, had before that time, done, performed, and bestowed, other his work and labor, care and diligence, as a farrier, in shoeing of divers other horses, mares, and geldings, for the said *Richard*; and had also, at the like request of the said *Richard*, found, provided, used, and applied divers other materials, and other necessary things, in and about the said last-mentioned work, he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 40*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. *And whereas* the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* in other 40*l.* of like lawful money, for the work and labor, care and diligence of the said *John*, by him the said *John* before that time, done, performed, and bestowed, for the said *Richard*, in and about the healing and curing of divers horses, mares, and geldings,

Quantum meruit.

Indebitatus assumpsit for carrying of horses.

Declarations in Assumpsit.

Quantum meruit
thereon.

geldings of the said *Richard*, of divers diseases, disorders, and maladies, under which they had before then respectively labored and languished, at the special instance and request of the said *Richard*; and for divers potions, draughts, ointments, medicines, and other necessaries, used, administered, and applied on those occasions by the said *John*, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. undertook, &c. : *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in, &c. in consideration that the said *John*, at the like request of the said *Richard*, had before that time, done, performed, and bestowed, other his work and labor, care and diligence, in and about the healing and curing of divers other horses, mares, and geldings of the said *Richard*, of divers other diseases, disorders, and maladies, under which they had labored and languished; and had also used, administered, and applied, at the like request of the said *Richard*, divers other potions, draughts, ointments, medicines, and other necessary things on those occasions, he the said *Richard*; then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 40*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice. *Add a count for money paid, (an insimul computasset, if necessary,) and common conclusion.*

Declaration for
the carriage of a
passenger from
New York to
London.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, being, &c. *For that whereas*, the said *Richard*, on the 20th day of *February*, in the year of our Lord 1794, to wit, at *Westminster*, in the

the said county, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for the carrying and conveying of the said *Richard* from parts beyond the seas, to wit, from *New York* to the port of *London*, in a certain ship or vessel called the *Nancy*, whereof the said *John* was master and commander, and at the special instance and request of the said *Richard*; he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, &c.

And whereas, afterwards, to wit, on the same *Quantum meruit*, day and year aforesaid, at *Westminster* aforesaid; in consideration that the said *John*, at the like request of the said *Richard*, had before that time carried and conveyed the said *Richard* from parts beyond the seas, to wit, from *New York* aforesaid to the port of *London*, in a certain other ship or vessel of the said *Richard*, called the *Nancy*, whereof the said *Richard* was master and commander; he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have; and the said *John* avers, &c. Add two counts for meat, drink, and other necessaries, found and provided by the said *John* for the said *Richard*, and at his request; money paid, and an account stated, with the common conclusion.

Was indebted to the said *John* in 50*l.* of lawful, For tonnage of goods, &c. &c. for the tonnage of divers goods, wares, and merchandises of the said *Richard*, by him, the said *John* before that time navigated, carried and conveyed, from the river of *Thames*, in *London* aforesaid, to *Pangborn* in the county of *Berks*, in a certain barge of the said *John*, for him the said *Richard*, and at his special instance and request; and being so indebted, &c.

In consideration that the said *John*, at the like *Quantum meruit*, request of the said *Richard*, had before that time navigated, carried and conveyed, divers other goods, wares, and merchandises, of him the said *Richard*,

Declarations in Assumpsit.

Richard, from the river of *Thames* aforesaid to *Pangborn* aforesaid, in a certain other barge of the said *John*; he the said *Richard*, then and there undertook, &c. Add two counts for work and labor of plaintiff and his servants, with certain barges of said plaintiff, at the request of the defendant; money paid, and conclusion.

For the sale of a
crop of grass
standing.

Was indebted to the said *John* in 60*l.* of lawful money of Great Britain, for a certain crop of grass of the said *John*, by him the said *John* before that time bargained and sold to the said *Richard*, and at his special instance and request, and by the said *Richard*, according to that bargain and sale, accepted, gathered, had and taken away; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, &c.

Quantum meruit.

In consideration that the said *John*, at the like special instance and request of the said *Richard*, had before that time bargained and sold to the said *Richard* a certain other crop of grass of the said *John*, and that the said *Richard* had, according to the said last-mentioned bargain and sale, accepted, gathered, and taken away the same; he the said *Richard*, then and there undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that, &c. Add a count for money paid, and common conclusion.

For a fix clerk
against one of
the 60 clerks, for
copies of plead-
ings, &c. in
the petty bag
office.

Middlesex, to wit. *W. L. S.* esquire, one of the fix clerks of the court of chancery of our lord the now king, complains of *Richard Roe*, gent. one of the clerks of him the said *W. L. S.*, now present here in court, in his own proper person, in a plea of trespass on the case, *For that whereas*, the said *Richard*, on the 19th day of *January*, in the year of our Lord 1793, at *Westminster*, in the said county, was indebted to the said *W. L.* in 500*l.* of lawful, &c. for so much money before that time of right due and payable from and by the said *Richard*,

Richard to the said *W. L.* for his lawful fees, as one of the six clerks of the said court of chancery, of our lord the king, accruing due to him for and on the copies of divers pleadings, and other records of the said court, usually dispatched in the office of the six clerks of the said court; and for and on the exemplification of divers bills, answers, and other proceedings in the said court; and for and on divers commissions of rebellion, issued out of the said court before that time, signed by the said *W. L.*, and by divers other persons duly authorized by the said *W. L.* in that behalf, as one of the six clerks as aforesaid, at the special instance and request of the said *Richard*, and delivered out by the said *Richard* to divers clients of him the said *Richard*, and other persons on behalf of such clients; and also for and on the doggets of divers decrees, and dismissions of bills, of, in and by the said court, before that time prepared by the said *Richard*, and examined by the said *W. L.*, and by divers other persons by him duly authorized in that behalf, at the like instance and request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *W. L.* to pay him the said sum of money, when he should be thereto afterwards requested:

And whereas, afterwards, to wit, on, &c. at *Westminster* aforesaid, in consideration that the *W. L.*, at the like instance and request of the said *Richard*, had before that time, by himself and other persons by him duly authorized in that behalf, signed; and that the said *Richard* had before that time delivered out, to certain other clients of him the said *Richard*, and other persons on behalf of such clients, divers other copies of divers other pleadings, and other records of the said court, and divers other exemplifications of divers other bills, answers, and other proceedings of the said court, and divers other commissions of rebellion, issued out

ad count for signing and delivering out to the clients of defendant, copies of pleadings, &c.

Declarations in Assumpsit:

3d count for
fees due on the
copies of plead-
ings, and on
commissions of
rebellion, &c.

4th count for
fees for the sign-

out of the said court; and also, in consideration that the said *W. L.*, at the like instance and request of the said *Richard*, had before that time, by himself, and other persons by him duly authorized in that behalf, examined and signed, divers other doggets of divers decrees and dismissions of bills, of, in, and by the said court prepared by the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *W. L.*, to pay him so much money as was due to him the said *W. L.*, for his fees of right due and payable to him in that behalf, when he should be thereto afterwards requested; and the said *W. L.* in fact saith, that another sum of 500*l.* of like lawful money, at the time of the making of the said last-mentioned promise and undertaking, was due and of right payable to him for his fees in that behalf, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard*, afterwards to wit, on, &c. at, &c. was indebted to the said *W. L.* in other 500*l.* of like lawful money, for so much money before that time of right due and payable from the said *Richard* to the said *W. L.*, for his lawful fees, as one of the six clerks of the said court, accruing due to him for and on the copies of divers pleadings, and other records of the said court, usually dispatched in the office of the six clerks of the said court; and also for and on the exemplification of divers bills, answers, and other proceedings in the said court; and for and on divers commissions of rebellion, issued out of the said court; and for and on divers other decrees and dismissions of divers bills, of, in, and by the said court, before that time signed by the said *W. L.*, and divers persons duly authorized by, and for and on the behalf of the said *W. L.*, and delivered so signed to the said *Richard*, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration, &c. undertook, &c. *And whereas*, &c. in consideration

deration that the said *W. L.* by himself, and divers other persons duly authorised by the said *W. L.* for that purpose, had before that time signed; and delivered to signed to the said *Richard*, divers other copies of divers other pleadings, and other records of the said court, usually dispatched in the office of the fix clerks of the said court, for and on the behalf of the said *W. L.*; and divers other exemplifications of divers other bills, answers, and other proceedings in the said court; and divers other commissions of rebellion, issued out of the said court; and divers other decrees and dismissions of bills, of, in, and by the said court, at the like request of the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *W. L.*, to pay him so much money as was due to the said *W. L.* for his fees, to him of right due and payable in that behalf, whenever he should be thereto afterwards requested; and the said *W. L.* in fact saith, that another sum of 500*l.* of like lawful money, at the time of the making of the said last promise and undertaking of the said *Richard*, was due and of right payable to him for his fees in that behalf, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice. (Add a count for money paid, and an account stated, if necessary) Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *W. L.*, but to pay the same, or any part thereof, to the said *W. L.* hath hitherto wholly refused, and still refuses, to the said *W. L.* his damage of 100*l.*, and therefore he prays remedy, &c. Add pledges to prosecute.

Declarations in Assumpsit.

For and against Executors.

For an executor,
for work done
and materials
found by the tes-
tator, goods sold
and delivered,
money lent, paid,
had, and receiv-
ed, and an *in-*
sum computasset,
p. 89.

London, to wit. *John Dinn*, executor of the last will and testament of *Thomas Roe*, deceased, complains of *Richard Fenn* being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas* the said *Richard*, on (a) the 10th day of *September*, in the year of our Lord 1794, to wit, at *London* afore- said, in the parish of *St. Mary-le-Bow*, in the ward of *Chapp*, was indebted to the said *Thomas*, in his life-time, in 60*l.* of lawful money of *Great-Britain*, for the work and labor, care and diligence, of the said *Thomas* in his life-time, by the said *Thomas* in his life-time, before that time done, performed and bestowed; in and about the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and for divers materials, and other necessary things, before that time found, pro- vided, used, and applied, in and about the said work and labor, by the said *Thomas*, in his life-time; for the said *Richard*, and at his like request, and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year afore- said, at *London* afore- said, in the parish and ward afore- said, undertook, and then and there faithfully promised the said *Thomas*, in his life-time, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, af- terwards to wit, on the same day and year afore- said, at *London* afore- said, in the parish and ward afore- said, in consideration that the said *Thomas*, in his life-time, at the like request of the said *Thomas*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*: and had also found, pro-

Quantum meruit.

(a) Any day in the life-time of the testator, and provided,

vided, used, and applied, divers other materials, and other necessary things, in and about the said work and labor, at the like request of the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised the said *Thomas*, in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard*, should be thereto afterwards requested; and the said *John* executor as aforesaid avers, that the said *Thomas* in his life-time, therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Thomas*, in his life-time, in other 60*l.* of like lawful money, for the work and labor, care and diligence of the said *Thomas*, in his life-time, by the said *Thomas*, in his life-time, before that time done, performed, and bestowed, in and about other the business of the said *Richard*, and for the said *Richard*, and at his special instance and request; and being so indebted, he, the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *Thomas*, in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *Thomas*, in his life-time, at the like request of the said *Richard*, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said *Richard*, and for the said *Richard*, he the said *Richard* then and there undertook, and faithfully promised,

Indebitatus assumpsit, for work and labor generally.

Quantum meruit.

Indebitatus assumpsit, for goods sold and delivered.

Quantum meruit.

the said *Thomas*, in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard*, should be thereto afterwards requested; and the said *John* executor as aforesaid avers, that the said *Thomas*, in his life-time, therefore reasonably deserved to have, of the said *Richard*, other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *Thomas*, in his life-time, in other 60*l.* of like lawful money, for divers goods, wares, and merchandises, by the said *Thomas*, in his life-time, before that time sold and delivered to the said *Richard*, at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *Thomas*, in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *Thomas*, in his life-time, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard*, divers other goods, wares, and merchandises, he the said *Richard*, then and there undertook, and faithfully promised the said *Thomas*, in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John* executor as aforesaid avers, that the said *Thomas*, in his life-time, therefore reasonably deserved to have, of the said *Richard*, other 60*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid,

afterwards, whereof the said Richard, afterwards to wit, on the same day and year aforesaid, there had notice: And whereas, the said Richard, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was indebted to the said Thomas, in his life-time, in other 60*l.* of like lawful money, for money by the said Thomas, in his life-time, before that time laid out, expended, and paid, for the said Richard, and at his special instance and request; and being so indebted, he the said Richard then and there undertook, and faithfully promised the said Thomas, in his life-time, to pay him the said sum of money last-mentioned, when he should be thereto afterwards requested: And whereas, the said Richard, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was indebted to the said Thomas, in his life-time, in other 60*l.* of like lawful money, for money by the said Thomas, in his life-time, before that time lent and advanced to the said Richard, at his like request; and being so indebted, he the said Richard, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said Thomas, in his life-time, to pay him the said sum of money last-mentioned, when he should be thereto afterwards requested: And whereas, the said Richard, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was indebted to the said Thomas, in his life-time, in other 60*l.* of like lawful money, for money by the said Richard, before that time had and received, to the use of the said Thomas, in his life-time; and being so indebted, he the said Richard, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said Thomas, in his life-time, to pay him the said last-mentioned sum of money,

Indebitatus assumpsit, for money paid.

The like, for money lent.

Money had and received.

Infimus computat.
let.

when he should be thereto afterwards requested: And whereas, the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *Thomas*, in his life-time, of and concerning divers other sums of money, before that time due and owing from the said *Richard* to the said *Thomas*, in his life-time, and then being in arrears and unpaid, and upon that account the said *Richard* was then and there found in arrears, and indebted to the said *Thomas*, in his life-time, in other 60*l.* of like lawful money; and being so found in arrears, and indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *Thomas*, in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: For the said *Richard* (although often requested &c.), hath not yet paid to the said *Thomas*, in his life-time, or to the said *John* executor as aforesaid, since his death, or to either of them, the said several sums of money, or any part thereof; but he to pay the same, or any part thereof to the said *Thomas*, in his life-time, or to the said *John* executor as aforesaid, since his death, hath hitherto wholly refused, and still refuses, to the said *John* executor as aforesaid, his damage of 100*l.* and therefore he brings his suit, &c. : And he brings into court here, the letters testamentary of the said *Thomas*, whereby it fully appears to the court here, that the said *John* is the executor of the last will and testament of the said *Thomas*, and hath the administration thereof, &c.; pledged, &c.

Breach.

Proferit in curia.

Notes.

ACTIONS at common law lay for executors on contract debt, covenant, &c.

No action lay for executors at common law, but such as had their commencement by contract, as debt, covenant, and the like; but not of account;

count; for that was given by the *stat. West. 2. 13. Ed. 1. c. 23.* So likewise no actions lay against executors at common law, upon the *simple contract* of the testator. *2 Roll. Rep. 308.* The *stat. 4 Ed. 3. c. 7.* gave an action to the executor, for the goods of the deceased being taken away; before this statute, the executor could not have this action; but if the goods were not consumed, he might replevy them. *W. Jones 173. 2 Inst. 404.*

An executor derives all his authority from the testator himself; and as executor without any thing more; he has the power of disposing of the estate of the testator, of releasing a debt due to the testator, and the like. True it is, before an action brought; a probate is necessary; but that is only requisite to ascertain the court, that the plaintiff is executor, and has a right to bring his action; not to give the plaintiff any title or interest to the estate of the testator: the rightful executor has not only a trust or authority to administer the goods of the testator, but also an interest annexed to the trust; and therefore the property of all the goods, after administration, is completely vested in him. *Com. 150. Trevor, C. J.*

If an action be brought by executors, *all should join.* *4 Term Rep. 565. per Buller, J.* even though some renounce before the ordinary. *11 Vintr 353. 372. 1 Salk. 3. 7 Mod. 30.*

As an executor stands in the place of his testator, and represents him; as to all his personal contracts, he therefore may regularly maintain any action in his right, which he himself might. *Roll. Abr. 912. Cro. Eliz. 377.*

The executor before probate may maintain an action, but cannot declare; for without producing the letters testamentary, he cannot assert his right in court. *Salk. 302. Roll. Abr. 917. 9 Co. 38.* He has all the title and interest by the testament, and not by the probate. *Ibid.*

If a man devise land by force of the *stat. H. 8. of wills*, or by custom, the probate of the will, in

The authority of an executor, is derived from the testament, and not by the probate.

Represents testator as to all his personal contracts.

And stands in his place.

When may bring actions.

The probate no evidence of lands devised.

Declarations in Assumpsit

the spiritual court, cannot be given in evidence for all the proceedings, as far as relate to lands, *arg. eorum non iudice*, for they have no power to authenticate any such devise, and therefore a copy produced under their seal, is no certain evidence of a true copy. 1 Roll. Abr. 678. *Ld. Ray.* 744.

But good evidence of the personality.

But the probate of a will is good evidence as to the personal estate, because they have the custody of all wills that concern the personal estate, and they are the records of that court, and therefore a copy of them, under the seal of that court, must be good evidence. *Bull. Nisi Pri.* 242. *Str.* 671. *Ld. Ray.* 262; where *Holt, C. J.* said, the judge of the spiritual court, is the only proper judge to determine the validity of wills, for things personal, and therefore the probate is undeniable evidence to the jury.

Copy of the probate when evidence.

It was also held by *Holt*, that the copy of the probate of a will is good evidence where the will itself is of chattels, for there the probate is an original taken by authority, and of a public nature; otherwise where the will is of things in the realty, because in such case, the ecclesiastical courts have no authority to take probates, therefore such probate is but a copy, and a copy of it no more than the copy of a copy. 3 *Salk.* 154. For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of a probate, of a will of lands, is no evidence, because the probate, in such case, is not an original taken by authority, and therefore is only a copy of a copy. *Camb.* 337.

N. B. As this precedent is framed, any assumpsit, *assumpsit*, or *quantum meruit* may be formed from it; for you have nothing more to do than alledge the defendant to be indebted to the testator in his life-time, which he promised to pay the testator when requested.

In the *quantum meruit*, you alledge the testator, in his life-time, did the work or sold the goods, and the executor avers how much they were reasonably worth at that time. An executor cannot add a count in his

own right, after he has counted as executor, 2 Str. 1271. 1 Will. 171. *Hooker v. Wallier*.

In declarations, at the suit of executors, for debts due to their testator, it is necessary to observe, ^{What necessary to state in the declaration.} 1. that they be stated as executors; 2. that the debt was due to the testator; 3. to state the day of the promise, previous to his death; and 4. to add the *proferi in curia* of the letters testamentary, the want of which will be bad on a special demurrer, but the declaration will be good, after verdict. Stat. 4 Ann. c. 16.; 16 and 17 Car. 2. c. 8; or judgment by default, 4 Ann. c. 16.

When an executor is indebted to the testator, his debt shall be released, for he cannot maintain an action against himself. 1 Salk. 305. *Off. Ex.* 44. 8 Co. 13. b. 1 Salk. 300. *Cru. Car.* 373. So where he is indebted jointly. 1 Salk. 300. But if such debtor refuse the executorship *before the ordinary*, it shall not be a release. 1 Salk. 301, 307. And though he is discharged in law, yet he ought to account in equity. *Ch. Caf.* 242.

London, ss. John Denn, surviving executor of the last will and testament of Richard Penn deceased, complains of Thomas Roe, being, &c. For that ^{For a surviving executor for money paid, money lent, &c. p. 109.} whereas, the said Thomas, on the 10th day of January, in the year of our Lord 1794, to wit at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said Richard, in his life-time, in 40l. of lawful money of Great Britain, for money by the said Richard, in his life-time, before that time laid out, expended, and paid for the said Thomas, and at his special instance and request, and for other money by the said Richard, in his life-time, before that time lent and advanced to the said Thomas, at his like instance and request; and being so indebted, he the said Thomas, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said Thomas, to pay him the said sum of money, when he should be

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out of the said court; and also, in consideration that the said *W. L.*, at the like instance and request of the said *Richard*, had before that time, by himself, and other persons by him duly authorized in that behalf, examined and signed, divers other doggets of divers decrees and dismissions of bills, of, in, and by the said court prepared by the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *W. L.*, to pay him so much money as was due to him the said *W. L.*, for his fees of right due and payable to him in that behalf, when he should be thereto afterwards requested; and the said *W. L.* in fact saith, that another sum of 500*l.* of like lawful money, at the time of the making of the said last-mentioned promise and undertaking, was due and of right payable to him for his fees in that behalf, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the same day and year aforesaid, there had notice: *And whereas*, the said *Richard*, afterwards to wit, on, &c. at, &c. was indebted to the said *W. L.* in other 500*l.* of like lawful money, for so much money before that time of right due and payable from the said *Richard* to the said *W. L.*, for his lawful fees, as one of the six clerks of the said court, accruing due to him for and on the copies of divers pleadings, and other records of the said court, usually dispatched in the office of the six clerks of the said court; and also for and on the exemplification of divers bills, answers, and other proceedings in the said court; and for and on divers commissions of rebellion, issued out of the said court; and for and on divers other decrees and dismissions of divers bills, of, in, and by the said court, before that time signed by the said *W. L.*, and divers persons duly authorized by, and for and on the behalf of the said *W. L.*, and delivered so signed to the said *Richard*, at the like request of the said *Richard*; and being so indebted, he the said *Richard*, in consideration, &c. undertook, &c. *And whereas*, &c. in consideration

3d count for
fees due on the
copies of plead-
ings, and on
commissions of
rebellion, &c.

4th count for
fees for the sign.

deration that the said *W. L.* by himself, and divers other persons duly authorised by the said *W. L.* for that purpose, had before that time signed, and delivered so signed to the said *Richard*, divers other copies of divers other pleadings, and other records of the said court, usually dispatched in the office of the six clerks of the said court, for and on the behalf of the said *W. L.*; and divers other exemplifications of divers other bills, answers, and other proceedings in the said court; and divers other commissions of rebellion, issued out of the said court; and divers other decrees and dismissions of bills, of, in, and by the said court, at the like request of the said *Richard*, he the said *Richard*, then and there undertook, and faithfully promised the said *W. L.*, to pay him so much money as was due to the said *W. L.* for his fees, to him of right due and payable in that behalf, whenever he should be thereto afterwards requested; and the said *W. L.* in fact saith, that another sum of 500*l.* of like lawful money, at the time of the making of the said last promise and undertaking of the said *Richard*, was due and of right payable to him for his fees in that behalf, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards, to wit, on the day and year aforesaid, there had notice. (Add a count for money paid, and an account stated, if necessary) Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *W. L.*, but to pay the same, or any part thereof, to the said *W. L.* hath hitherto wholly refused, and still refuses, to the said *W. L.* his damage of 100*l.*, and therefore he prays remedy, &c. Add pledges to prosecute.

thereto requested; and the said *John* and *Thomas*, executors as aforesaid aver, that they therefore reasonably deserved to have of the said *Richard*, other 20*l.* of like lawful money, to wit at *Westminster* aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice: add a count for money had and received to the use of the plaintiffs as executors. Yet the said *Richard* (although often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John* and *Thomas*, or either of them, but to pay the same to them, or either of them, he the said *Richard* hath wholly refused and still refuses, to the damage of the said *John* and *Thomas*, executors as aforesaid, of 20*l.*

Branch.

Profert in curia. and therefore they bring their suit, &c.; And they bring into court here, the letters testamentary of the said *Simon*, by which it sufficiently appears to the court here, that the said *John* and *Thomas* are the executors of the last will and testament of the said *Simon*, and have the administration thereof, &c.

For an executor
against an execu-
tor, for goods
sold, p. 91.

Gloucestershire, to wit. *John Durr*, executor of the last will and testament of *Thomas Roe* deceased, complains of *Richard Penn*, executor of the last will and testament of *Robert Booth* deceased, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, For that whereas, the said *Robert Booth*, in his life time, to wit on the 10th day of *March*, in the year of our Lord 1793, to wit at *Cheltenham*, in the said county, was indebted to the said *Thomas Roe*, in his life-time, in 40*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandises, by the said *Thomas*, in his life time, before that time sold and delivered to the said *Robert*, in his life-time, and at his special instance and request; and being so indebted, he the said *Robert*, in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Cheltenham* aforesaid, undertook, and then and there faithfully promised the said *Thomas* in his
life

vided, used, and applied, divers other materials, and other necessary things, in and about the said work and labor, at the like request of the said Richard, he the said Richard then and there undertook, and faithfully promised the said Thomas, in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he the said Richard, should be thereto afterwards requested; and the said John executor as aforesaid avers, that the said Thomas in his life-time, therefore reasonably deserved to have of the said Richard other 60*l.* of like lawful money, to wit, at London aforesaid, in the parish and ward aforesaid, whereof the said Richard, afterwards to wit, on the same day and year aforesaid, there had notice: *And whereas,* afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, was indebted to the said Thomas, in his life-time, in other 60*l.* of like lawful money, for the work and labor, care and diligence of the said Thomas, in his life-time, by the said Thomas, in his life-time, before that time done, performed, and bestowed, in and about other the business of the said Richard, and for the said Richard, and at his special instance and request; and being so indebted, he, the said Richard, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said Thomas, in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: *And whereas,* afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said Thomas, in his life-time, at the like request of the said Richard, had before that time done, performed, and bestowed, other his work and labor, care and diligence, in and about other the business of the said Richard, and for the said Richard, he the said Richard then and there undertook, and faithfully promised,

Indebitatus assumpsit, for work and labor generally.

Quantum meruit.

Breach.

requested: Yet the said *Robert*, in his life-time, and the said *Richard* executor as aforesaid, since his death (although often requested, &c.), have not; nor hath either of them, yet paid the said several sums of money, or any part thereof; to the said *Thomas*, in his life-time; or to the said *John*, executor of the said *Thomas* as aforesaid, since his death; or to either of them, but the said *Robert*, in his life-time, and the said *Richard* executor as aforesaid, since his death, to pay the same to the said *Thomas*, in his life-time, or to the said *John* executor of the said *Thomas* as aforesaid, since his decease, or to either of them, have; and each of them hath, hitherto wholly refused, and the said *Richard*, executor of the said *Robert* as aforesaid, still refuses to pay the same to the said *John* executor as aforesaid; to the said *John* executor as aforesaid, his damage of 40*l.*; and therefore he brings his suit, &c. And the said *John* executor as aforesaid, brings into court here, the letters testamentary of the said *Thomas*, by which it appears to the court here, that the said *John* is the executor of the last will and testament of the said *Thomas*, and hath the administration thereof, &c.; pledges, &c.

*Profert.**Notes.*

In declaring against an executor, on a promise by his testator, it is not necessary to state that the defendant has assets, for if he has not, it lies on him to discharge himself by his plea. *Hunt v. Cro. Eliz.* 59.; nor need profits be made of the defendant's letters testamentary, because the plaintiff has not them in his power to produce to the court.

Vide, p. 92. Conclusion in an action where the wife is executrix, and she and her husband bring the action. The wife was covert at the time of

Yet the said *Richard* (although often requested, &c.), in this respect, hath not yet paid the said several sums of money, or any part thereof; to the said *Thomas*, in his life-time, or to the said *John*, and his wife, executrix as aforesaid, since his death, or to either of them; but he so pay the same to the said *Thomas*, in his life-time; or to the said *John* and his

Ann

Ann his wife, executrix as aforesaid, since his death, or to either of them, hath hitherto wholly refused, and still refuses, to the said *John* and *Ann* his wife, executrix as aforesaid, their damage of 40*l.*; and therefore they bring their suit, &c.; And the said *John* and *Ann* bring into court here, the letters testamentary of the said *Thomas*, by which it appears to the court here, that the said *Ann* is the executrix of the last will and testament of the said *Thomas*, and have the administration thereof, &c.

Notes.

As a wife named or appointed in a will, may not be compelled unto the execution thereof, without her own and her husband's consent; so neither shall she assume or accept such executorship, without her husband's consent and approbation, because it is in his power to oppose and hinder it. *Off. Ex. c. 17.* This is true doctrine at the common law. 2 *H. 7. 15.* But if she prove the will, she may make a will and executor, without her husband's consent. *Fitz. Abr. 20. Perk. c. 8. p. 97.*

If once the wife administer, though without the husband's privity and assent, and though no will proved, this will go far to exclude them both for ever after from pleading, that she was not executrix, nor administered as executrix: the law is the same if once the will be proved, and the execution thereof be committed to the wife, though against her husband's mind and consent. *Godolp. 110. cites Brooke, tit. Ex. 147.*

It frequently happens that an *in simul computasset* is added to a declaration, at the suit of an executor with the testator, and also the like count with the executor himself, if that count should be necessary, then after the *in simul computasset with the testator*, add the following conclusion first: Yet the said *Richard* (although often requested, &c.), hath not yet paid to the said *Thomas*, in his life time, or to the said

John

The count.

Brach.

Conclusion,
where an execu-
tor of an execu-
tor is the plain-
tiff in case, *vide*
p. 93.

John executor as aforesaid, since his death, or to either of them, the said several sums of money, or any part thereof, but he to pay the same, or any part thereof to the said *Thomas*, in his life-time, or to the said *John* executor as aforesaid, since his death, or to either of them, hath hitherto wholly refused, and still refuses: And whereas, also the said *Richard*, afterwards to wit, on the 14th day of *October*, in the year aforesaid, at *Westminster* aforesaid, accounted together with the said *John* as such executor as aforesaid, of and concerning divers sums of money, due and owing from the said *Richard* to the said *Thomas*, in his life-time, and at the time of his death, and then remaining unpaid, and upon that account the said *Richard* was then and there found in arrear, and indebted to the said *Thomas* in the further sum of 40*l.* of like lawful money; and being so found in arrear and indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and to the said *John* as such executor as aforesaid, then and there faithfully promised the said *John*, to pay him the said last-mentioned sum of money; when he the said *Richard* should be thereto afterwards requested: Yet the said *Richard* (although often requested, &c.) hath not yet paid the said last-mentioned sum of money, or any part thereof, to the said *John* executor as aforesaid; but to pay the same, or any part thereof, to the said *John* executor as aforesaid, the said *Richard* hath hitherto wholly refused, and still refuses, to the said *John* executor as aforesaid, his damage of 50*l.*; and therefore he brings his suit, &c.) add the *proferi* of the letters testamentary, as in p. 89: Yet the said *Richard* (although often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Thomas*, in his life-time, or to the said *John*, the executor of the said *Thomas* as aforesaid, in his life-time, or to the said *Richard*, executor as aforesaid of the said *John*; or to either of them, but he to pay the same, or any part thereof to the said *Thomas*, in his life-time, or to the said *John*, executor

executor as aforesaid of the said *Thomas*, in his lifetime, or to the said *Robert*, executor as aforesaid of the said *John*, or to either of them, hath hitherto wholly refused, and still doth refuse, to the said *Robert* executor as aforesaid, his damage of 40*l.*; and therefore he brings his suit, &c.

And the said *Robert* brings into court here, as *Prover of the* well the letters testamentary of the said *Thomas*, by *two probates*, which the said *John* appears to the court here, to be executor of the last will and testament of the said *Thomas*; as also the letters testamentary of the said *John*, by which it appears to the court here, that the said *Robert* is the executor of the last will and testament of the said *John*, and hath the administration thereof, &c.

Notes.

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of *A.*'s executor is to all intents and purposes the executor and representative of *A.* himself. 1 *Leon.*

The Stat. 25 *Ed. 3.*, Stat. 5. c. 5, enacts, that executors of executors shall have actions of debt, &c. in the same manner as the first testator should have had, if he were in life; and the same executors of executors, shall answer to others of as much as they have recovered of the goods of the first testators, as the first executors should do, if they were in full life. But the executor of *A.*'s administrator or the administrator of *A.*'s executor, is not the representative of *A.* Bro. 7, title *Adm.* For

Executors of executors may have actions.

the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of *A.* is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore on the death of that officer, it reverts back to the ordinary, who appoint another. 50. a25.

Swin. 382.
1 Roll. 907.

There

Two executors, one refuses to prove, probate to the other, he who refuses died, and made an executor, he who first proved may have debt.

There were *two* executors, one proved the will, the other refused before the ordinary, who granted administration to the other, who made his executor, and died; and that executor *alone* brought debt, for a debt due to the first testator, and adjudged that the action did lie; for though he who refused might administer at any time, yet it must be in the life-time of his companion, and he being dead, that election is gone. *Dy. 160.*

If one executor refuse, and the rest prove, person refusing may at any time come in by the common law.

The common lawyers held, that if one executor refuseth before the ordinary, and the rest prove the will, yet, at common law, he who refused may at any time come in and administer; and though he never acted whilst his companions were living, yet after his death, he shall be preferred before any other executor, made by a co-executor; although the civilians held that, by their law, the renunciation was peremptory. *1 Salk. 311. Housé v. Lord Petre, before the delegates.*

Conclusion for husband and wife executrix where she marries, after probate of the will granted to her, p. 92.

In this case the husband joins with her in the action. Yet the said *Richard* (although often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Thomas*, in his life-time, or to the said *Ann* executrix as aforesaid, since his death, or to the said *John* and *Ann*, since her intermarriage with the said *John*, or to either of them; but he to pay the same to the said *Thomas*, in his life-time, or to the said *Ann* executrix as aforesaid, since his death, or to the said *John* and *Ann*, since her intermarriage with the said *John*, or to either of them, hath hitherto wholly refused, and still refuses, to pay the same, or any part thereof, to the said *John* and *Ann* his wife, to the said *John* and *Ann* executrix as aforesaid, their damage of 40*l.*, and therefore they bring their suit, &c.; And the said *John* and *Ann* his wife, bring into court here, the letters testamentary of the said *Thomas*, by which it appears to the court here, that the said *Ann* is the executrix of the last will and testament of the said *Thomas*, and have the administration thereof, &c.

Proferit.

Notes.

A *feme covert* may be appointed executrix, and in the spiritual courts she is considered as *feme sole*, capable of suing, and being sued, without her husband; but, by our law, husband and wife, are considered but as one person, and as having one mind, which is placed in the husband, as most capable to rule and govern the affairs of the family; and therefore the wife can do no act which may prejudice the husband, without his consent and concurrence: Hence the *husband must be joined* in all actions, by or against his wife, and consequently a wife cannot, by our laws, take upon her the office of executorship, without the consent of her husband. *Off. of Ex.* 203. *Keilw.* 122.

Feme covert may be appointed executrix.

Husband in actions must join with the wife.

In an action for any thing due to the wife, *en auter droit*, they ought to join, as if they were for a debt, &c. to the wife, as executrix or administratrix. *Com. Dig.* 1 V. 572. *Vide* 1 *Salk.* 282.

If a woman, executrix to her husband deceased, doth waste his goods, and take another to husband, it is a *devastavit* in him and her. *Gouldsb.* 115. 1 *Roll.* 269. 3 *Cro.* 603. *Lut.* 674.

The husband of a *feme covert* executrix cannot sue, or be sued, in right of the testator, *without his wife.* *Off. Ex.* 298.

If a *feme* executrix or administratrix takes husband, and they commit a *devastavit*, but the wife dies before judgment against them, the husband shall not be charged. *Cro. Car.* 519. 2 *Vern.* 118.

If husband and wife recover judgment in debt, in right of the wife as executrix to A., and the wife dies, the husband shall not have execution, though he be privy, for the debt belongs to the succeeding executor or administrator. 1 *Roll.* 889. 1. 10. *Com. Dig.* 1 V. 576.

Middlesex, to wit. *John Denn*, executor of the last will and testament of *Thomas Roe* deceased, complains of *Richard Fenn* and *Ann* his wife, married after

For an executor against an executrix, who inter-

B b .

(which probate.

Declarations in Assumpsit.

(which said *Ann* is the executrix of the last will and testament of *Robert Jupp* deceased,) being, &c. For that whereas, the said *Robert Jupp* in his life-time, to wit, on the 10th day of *March*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, was indebted to the said *Thomas* in his life-time, in 50*l.* of lawful money of *Great Britain*, for money by the said *Thomas* in his life-time, before that time laid out, expended, and paid for the said *Robert* in his life-time, and at his special instance and request; and being so indebted, he the said *Robert*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *Thomas* in his life-time, to pay him the said sum of money, when he should be thereto afterwards requested: Yet the said *Robert* in his life-time, and the said *Ann*, executrix as aforesaid since his death, and before her intermarriage with the said *Richard*; and the said *Richard* and *Ann* his wife, since their intermarriage (although often requested, &c.), have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *John* executor as aforesaid since his death, or to either of them, but to pay the same, or any part thereof, to the said *Thomas* in his life-time, or to the said *John* executor as aforesaid, or to either of them, have, and each of them hath, hitherto wholly refused, and the said *Richard* and *Ann* his wife, executrix as aforesaid, do still refuse, to the said *John* executor as aforesaid, his damage of 50*l.*; and therefore he brings his suit, &c.; pledges, &c. Add proferit in curia of the letters testamentary to plaintiff, as in p. 89.

. Breach.

Notes.

If an executrix or administratrix marry after probate, or administration granted, the suit must be

be against the husband as well as the wife, for the debt of her testator or intestate.

If a man marries an administratrix to a former husband, who in her widowhood wasted the assets of her intestate, the husband is liable to the debts of the intestate, during the life of the wife; and this shall be deemed a *devastavit* in him, *Cro. Car.* 603. *Abr. Cas.* 66., after her death. *Lunw.* 674. 2 *Vern.* 195.

London, to wit. John Denn complains of Richard Fenn, executor of the last will and testament of Thomas Doe deceased, being, &c. in a plea of trespass on the case, *For that whereas*, the said Thomas, in his life-time, to wit, on the 20th day of March, in the year of our Lord 1794, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, was indebted to the said John in 50*l.* of lawful money of Great Britain, for the work and labor, care and diligence, of the said John, by him the said John, before that time done, performed, and bestowed, in and about the business of the said Thomas in his life-time; and for the said Thomas in his life-time, and at his special instance and request; and being so indebted, he the said Thomas in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said John, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in consideration that the said John, at the like request of the said Thomas in his life-time, had before that time, done, performed, and bestowed other his work and labor, care and diligence, in and about other the business of the said Thomas in his life-time, and for the said Thomas in his life-time, he the said Thomas in his life-time, undertook, and then and there faithfully promised the said John, to pay him so much money as he therefore reason-

Declaration
against an ex-
ecutor, p. 90.

Quantum meruit.

Declarations in Assumpsit.

Breach.

ably deserved to have, when he the said *Thomas* in his life-time, should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have, of the said *Thomas* in his life-time, other 50*l.* of like lawful money, to wit, at *London* aforesaid, in the parish and ward aforesaid, whereof the said *Thomas*, in his life-time, afterwards to wit, on the same day and year aforesaid, there had notice: (add a count for money paid, laid out, and expended, by the plaintiff, for the said *Thomas* in his life-time). Yet the said *Thomas* in his life-time, and the said *Richard* executor as aforesaid since his death (although often requested, &c.), have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but the said *Thomas* in his life-time, and the said *Richard*, executor as aforesaid, since his death, to pay the same, or any part thereof, to the said *John*, have, and each of them hath, hitherto wholly refused, and the said *Richard*, executor as aforesaid, still refuses, to the said *John* his damage of 50*l.*; and therefore he brings his suit, &c.; pledges, &c.

Notes.

An action lies against an executor or administrator upon every contract, debt, or covenant, made by his testator or intestate. *Off. Ex.* 169. But debt does not lie against an executor, where the testator might have waged his law, as in debt upon simple contract. 9 *Co.* 87. b. *Cro. Eliz.* 600.

In action against executor, he must be so named.

In an action against an executor, he must be named executor, or be shewn to be executor; for if the declaration shews the defendant to be executor, though it does not name him executor in the beginning, it is sufficient. 1 *Saund.* 112. *Str.* 781. *Ld. Ray.* 1510. Nor need the plaintiff alledge assets, for it shall be intended. 9 *Co.* 94. 2.

If

If an executor suffers judgment by default, he admits assets. 1 Sal. 310.

The action of *assumpsit*, was held not to lie against an executor before the 4 & 5 Ph. & Mar. *Norwood v. Read*, Plow. 180.

Yet the said *Richard Browne* in his life-time, and the said *H. F.* executor as aforesaid in his life-time, and the said *Richard Fenn*, executor as aforesaid since the death of the said *H. F.* (although often requested, &c.), have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but the said *Richard Browne* in his life-time, and the said *H. F.* since his decease in his life-time, and the said *Richard Fenn* since the death of the said *H. F.* to pay the same, or any part thereof, to the said *John*, have, and each of them hath, hitherto wholly refused, and the said *Richard Fenn*, executor as aforesaid, still refuses to pay the same, or any part thereof to the said *John*, to the said *John* his damage of 20*l.*; and therefore he brings his suit, &c.

Conclusion
against an executor of an executor, in case, vide, p. 92.

Notes.

As the executor's executor (where there is no joint executor) is executor to the first testator, he is liable to all the charge the first executor had or was subject unto, with this difference, that the one testator's goods shall not stand charged for the other testator's debts, but each for his own. *Godolph. 87.* The stat. 25 Ed. 3. st. 5. c. 5. enacts, that executors of executors shall answer to other of as much as they have recovered of the goods of the first testator's, as the first executors should do, if they were in full life.

Executor of an executor is liable to make good the quantum of the *devastavit* to the creditors, if he has assets from the first executor. *Chan. Cas. 257.* And so far as the personal estate of the first testator, which is come to the hands of the second

Declarations in Assumpsit.

executor, will go, the second executor shall answer, *Ibid.* 217. *Vide* 4 & 5 W. & M. 24. f. 12.

Against a surviving executor in C. P. for money lent, paid, and had, and received, p. 91.

London, to wit. *Richard Fenn*, late of *London*, yeoman, surviving executor of the last will and testament of *Thomas Roe* deceased, was attached to answer *John Denn*, in a plea of trespass on the case, and whereupon the said *John*, by *J. K.* his attorney, complains, *That whereas*, the said *Thomas* in his life-time, to wit, on the 10th day of *March*, in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, was indebted to the said *John* in 50*l.* of lawful money of *Great Britain*, for money by the said *John* before that time lent and advanced to the said *Thomas* in his life-time, at his special instance and request, and for other money by the said *John*, before that time laid out, expended, and paid, for the said *Thomas* in his life-time, at his like request, and for other money by the said *Thomas* in his life-time, before that time had and received, to the use of the said *John*; and being so indebted; he the said *Thomas* in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, the said *Thomas*, in his life-time, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, accounted together with the said *John*, of and concerning divers other sums of money, to the said *John* from the said *Thomas*, before that time due and owing, and then being in arrear and unpaid, and upon that account, the said *Thomas* in his life-time, was then and there found in arrear, and indebted to the said *John* in other 50*l.* of like lawful money; and being so found in arrear, and indebted to the said *John*, he the said *Thomas* in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid,

Insolvent compunctus.

aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the last-mentioned sum of money, when he should be thereto afterwards requested: Yet the said *Thomas* in his life-time, and the said *Richard*, surviving executor as aforesaid since his death, and one *Robert Doe*, the other executor named in the said will of the said *Thomas*, and who duly proved the same with the said *Richard*, and whom the said *Richard* hath survived, (although often requested, &c.), have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but the said *Thomas* in his life-time, and the said *Richard* and *Robert* executors as aforesaid, in the life-time of the said *Robert*, and since the death of the said *Thomas*, and the said *Richard*, since the death of the said *Robert*, to pay the same or any part thereof, to the said *John*, have, and each of them hath, hitherto wholly refused, and the said *Richard*, surviving executor as aforesaid, still refuses, to the said *John* his damage of 60*l.*; and therefore he brings his suit, &c.

Notes.

In case both the executors accept the executorship, and one of them die, the surviving executor shall be sole executor; and the executor of the deceased executor shall be excluded as to the goods of the first testator; whereof, if he hath in his hands, he must account to the surviving executor for the same. *Dj.* 160. *Godol.* 234.

If two be appointed executors, and the one maketh his testament, wherein he nameth his executor, and dieth, his co-executor surviving; in this case, the executor is not to be joined with the executor, neither in the execution of the will, nor in suits or actions. *Swinb.* 324.

One executor shall not be charged with the wrong or devastation of his companion, and shall be

no farther liable, than for the assets which came to his hands. 2 Bac. Abr. 395.

Conclusion
against husband
and wife exe-
cutrix, where
the married after
probate, etc. of an
executor, p. 93.

Yet the said *Thomas* in his life-time, and the said *Ann* since his death, and the said *Richard* and *Ann*, since their intermarriage (although often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *Robert* in his life-time, or to the said *John* executor as aforesaid since his death, nor to either of them; but the said *Thomas* in his life-time, and the said *Ann* executrix as aforesaid since his death, and the said *Richard* and *Ann*, since their intermarriage, to pay the same, or any part thereof, to the said *Robert* in his life-time, or to the said *John* executor as aforesaid since his death, have, and each of them hath, hitherto wholly refused, and the said *Richard* and *Ann* do still refuse, to the said *John* executor as aforesaid his damage of 50*l.* and therefore he brings his suit, &c. Add *proferat in curia* of the letters testamentary to the plaintiff, as in p. 89.

For an admin-
istrator for
goods sold and
delivered by his
testate, p. 95.
90. any day
before the death
of *Thomas Roe*.

Middlesex, to wit. *John Denn*, administrator of all and singular the goods, chattels, rights, and credits, which were of *Thomas Roe* deceased, complains of *Richard Fenn*, being, &c. For that whereas, the said *Richard*, on the 10th day of July, in the year of our Lord 1794, to wit, at *Westminster* in the said county, was indebted to the said *Thomas* in his life-time, in 60*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandises, by the said *Thomas* in his life-time before that time sold and delivered to the said *Richard*, at his special instance and request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then there faithfully promised the said *Thomas* in his life-time, to pay him the said sum of money, when he should be thereto afterwards requested: And whereas, afterwards to wit, on the same day and year aforesaid, at *Westminster* afore-

Quantum meruit.

aforesaid, in consideration that the said *Thomas* in his life-time, at the like request of the said *Richard*, had before that time sold and delivered to the said *Richard* divers other goods, wares, and merchandises, he the said *Richard*, then and there undertook, and faithfully promised the said *Thomas* in his life-time, to pay him so much money as he therefore reasonably deserved to have, when he the said *Richard* should be thereto afterwards requested; and the said *John*, administrator as aforesaid, avers, that the said *Thomas* in his life-time therefore reasonably deserved to have of the said *Richard* other 60*l.* of like lawful money, to wit, at *Westminster* aforesaid, whereof the said *Richard* afterwards to wit, on the same day and year aforesaid, there had notice. And whereas the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *Thomas* in his life-time, in other 60*l.* of like lawful money, for money by the said *Thomas* in his life-time, before that time, lent and advanced to the said *Richard*, at his special instance and request; and for other money by the said *Thomas* in his life-time, before that time laid out, expended, and paid for the said *Richard*, at his like request; and for other money by the said *Richard* before that time had and received, to the use of the said *Thomas* in his life-time; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and there faithfully promised the said *Thomas* in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: And whereas, the said *Richard*, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, accounted together with the said *Thomas* in his life-time, of and concerning divers other sums of money, from the said *Richard* to the said *Thomas* in his life-time before that time due and owing, and then in arrear unpaid, and upon that account, the said *Richard*

*Indebitatus
assumpsit for
money lent.*

*Money paid, and
had and received.*

*In simul compen-
sasset.*

was

Declarations in Assumpsit.

Breach.

was then and there found in arrear and indebted to the said *Thomas* in his life-time in other 60*l.* of like lawful money; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *Thomas* in his life-time, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: Yet the said *Richard* (altho' often requested, &c.) hath not, yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, (to which said *John*, administrator of all and singular the goods, chattels, and credits, which were of the said *Thomas* at the time of his death, after the death of the said *Thomas*, to wit, on the 20th day of *October*, in the year aforesaid, by

Date of the administration.

You are to state from the letters of administration who granted them, in the very words.

Profert of letters of administration.

by Divine Providence, *archbishop of Canterbury primate of all England, and metropolitan* (a), in due form of law was granted,) but he to pay the same, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, administrator as aforesaid, since his death, hath hitherto wholly refused, and still refuses, to the said *John*, administrator as aforesaid, his damage of 60*l.*, and therefore he brings his suit, &c.

And he brings into court here the said letters of administration, which sufficiently prove to the court here, the granting thereof in form aforesaid, the date whereof is the day and year in that behalf abovementioned. Pledges, &c.

Notes.

Of the different administrators.

There be, says Lord *Coke*, divers kinds of intestates, one that make no will at all, another that makes a will and executors, and they refuse; and,

(a) If by the *archbishop of York*, say, By Divine Providence *archbishop of York, primate and metropolitan of England*.

in this case, he dieth *quasi intestatus*. And these are within the purview of the stat. *Westm.* 2. 13 *Ed.* 1. st. 1. c. 19., by which it is enacted, *That the ordinary shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as executors of the same party should have been bounden, if he had made a testament*; therefore the ordinary is the person whom the law appointeth to have the charge or administration of the goods and chattels of the party that dieth intestate, or *quasi intestatus*. And justly did the law in this case appoint the ordinary; for the law presumed, that he, who had the care of his soul in his life-time, would after his death, have care of his temporal goods and chattels, to see them well disposed and administered. 2 *Inst.* 397. And this act was made in affirmance of the common law.

But unless some of the goods or chattels *came to the hands and possession of the ordinary*, he was not to be charged by the common law; but if they came to his hands, and he should neither administer, and pay the debts and duties himself, nor commit them over to the kin and friends of the intestate that would, the common law did charge him, and so doth this act, which is made in affirmance of it. *Ibid.*

By the common law, an administrator could not recover debts as executors could do; therefore the statute, 31 *Ed.* 3. st. 1. c. 11., enacts, *That the administrator shall have an action to demand and recover the debts due to the person intestate*. But by the common law, administrators were charged by the name of executors, 2 *Inst.* 398.; and if administration be granted to two, and one die, the office survives. 2 *Vern.* 514.

Where any judgment after a verdict shall be had by or in the name of an executor or administrator, in such case, an administrator of the goods unadministered, may sue forth a *scire facias*, and take out execution upon such judgment. Stat. 17 *Car.* 2. c. 8.

Office survives.

Administrator de bonis non.

In

Pay no costs.

In all actions brought by executors or administrators upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute. *Gill. L. of Ex.* 462. *Cro. Eliz.* 69; 503; *Cro. Jac.* 229, 361. *Lord Ray.* 1414. *Sir T. Jones* 47.

When administration only evidence.

Letters of administration under seal are evidence in actions for debts and personal chattels: If the administrator cannot produce the letters of administration, the book of the ecclesiastical court where the order was entered for granting them is evidence, or a copy of the book will be sufficient; but the administrator shall not be permitted to give such book or copy in evidence, until he have proved the administration, under the seal of the court, lost. 1 *Lev* 25. 101. *Peasly's Case.* *Lewis v. Brag,* *M.* 16. *Geo. 2. coram Lee.* *Bull.* 106.

Rules to be observed in declarations by administrators.

In declarations by administrators, the following rules are to be observed: 1. *That he be named administrator.* 2. *That the debt declared on be due to the intestate.* 3. *That the day in the declaration be laid previous to his death.* 4. In case there be an *infinis computasset*, that the account stated be between the intestate and defendant, and not between the administrator and defendant, 1 *Show.* 366., tho' there may be a *like count* with the administrator himself, as in case of an executor. 5. *That administration was granted to him, and by whom.* 6 *Med.* 135. 1 *Salk* 38. And this last is not aided on a general demurrer, *ibid*, but shall be aided after verdict. 16 and 17 *Car. 2. c. 2. s. 8.* 6. *It must appear when administration was granted,* 5 *Com. Dig.* 207. And, 7. That proof of the letters of administration must be made, or will be had on a special demurrer. 4 *Ann. c. 16.*

When admittance of a rightful administrator.

It seems, if an administrator sets forth that an administration was granted to him, and does not say *by whom*, and the defendant pleads over, that is an admittance of the plaintiff's being a *rightful administrator*; but if he shews that administration was granted by one that had no authority, as if he

If shewn administration granted by one that has no authority.

sets

sets forth an administration by a *peculiar* jurisdiction, when there appears to be *bona notabilia*, that shall not be the same as if he had said, that administration was granted, and did not say *by whom*; but he can have no judgment. 6 Mod. 134. And the reason appears to be, that where the matter is indifferent to be well or ill, and the party pleads over, they will intend it well.

If administration be granted by a *peculiar* jurisdiction, the plaintiff must say, at least, *cui pertinuit*, or *loci illius ordinari*; for it is the committing of administration, by one having legal authority, that vests the cause of action in the plaintiff; and the ordinary by law is to commit administration. And in all cases of *peculiar*s, you must show a title and right to grant administration; and the least averment that can do it is to say, that *de jure* it did belong to him to grant administration, for the court cannot take notice of *peculiar*s, but may of *bishops*; and a *profect in curia* of the letters of administration is not enough, for they only certify what is on the face of them, viz. that administration was committed to the plaintiff by such a one; but that does not import he had any right to grant any. Per Holt. 6 Mod. 241. Vide 1 Salk. 40. But the omission of *cui pertinuit*, &c. shall be aided after verdict. 4 Mod. 133. Skin. 551. Show. 335.

If administration be alledged to be granted by the king, it is sufficient without more; for his authority is known. 1 Sid. 302. So if alledged to be granted by an *archbishop* or *bishop*, Lut. 1266. Cro. Eliz. 6.; or by an *archdeacon*, for he is *oculus episcopi*, 2 Roll. 150. 1 Lev. 193.; or by the *official* or *commissary* of a *bishop*, 2 Mod. 65. 1 Salk. 41.; or by the *vicar-general* of a *bishop*, for this means his *chancellor*. 1 Leon. 312.

If the *profect* of letters of administration be omitted in the declaration, the defendant may take advantage by *special demurrer*, otherwise it is good after verdict, that. 4 Ann. c. 16.; or judgment by default, *ibid.* Vide Vent. 222., where formerly held to be otherwise.

Yet

Conclusion for a
surviving admin-
istrator, p. 99.

Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, surviving administrator as aforesaid, since his death, or to one *Robert Moore*, now deceased, in his life-time, and whom the said *John* hath survived; or to either of them, (to which said *John* and *Robert*, in the life-time of the said *Robert*, administration of all and singular the goods, chattels, and credits, which were of the said *Thomas* at his time of his death, after the death of the said *Thomas*, to wit, on the 10th day of *March*, in the year aforesaid, by by Divine Providence, lord bishop of *Winchester* in due form of law was granted,) but he to pay the same; or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, surviving administrator as aforesaid, since his death, or to the said *Robert* in his life-time, and whom the said *John* hath survived, or to either of them, hath hitherto wholly refused, and the said *Richard* still refuses, to pay the same to the said *John*, surviving administrator as aforesaid, to the said *John*, surviving administrator as aforesaid, his damage of 60*l.*, and therefore he brings his suit, &c. And the said *John* brings into court here the said letters of administration, whereby it appears to the court here the granting thereof to the said *John* and *Robert*, in the life time of the said *Robert*, in form aforesaid; and the said *Robert* being now dead, the said *John* is the surviving administrator as aforesaid, the date whereof is on the day and year in that behalf abovementioned.

*Proferat hic in
curia of admin-
istration.*

Declaration
against an admin-
istrator for
goods sold and
delivered, &c.

Middlesex, to wit. *John Denn* complains of *Richard Fenn*, administrator of all and singular the goods, chattels, rights, and credits, which were of *Thomas Doe* deceased, being, &c. For that whereas, the said *Thomas* in his life-time, to wit, on the 1st day of *October*, in the year of our Lord 1794, at *Westminster* in the said county, was indebted to the said *John* in 60*l.* of lawful money of *Great Britain*, for divers goods, wares, and merchandises, by the
said

said *John* before that time sold and delivered to the said *Thomas* in his life-time, and at his special instance and request; and being so indebted, he the said *Thomas* in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: *And whereas*, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, in consideration that the said *John*, at the like request of the said *Thomas* in his life-time, had before that time, sold and delivered to the said *Thomas* in his life-time, divers other goods, wares, and merchandises, he the said *Thomas* in his life-time, undertook, and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he the said *Thomas* should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Thomas* in his life-time other 60*l.* of lawful money, to wit, at *Westminster* aforesaid, whereof the said *Thomas* in his life-time, afterwards to wit, on the same day and year aforesaid, there had notice. *And whereas*, the said *Thomas* in his life-time, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, was indebted to the said *John* in other 60*l.* of like lawful money, for money by the said *John* before that time laid out, expended, and paid for the said *Thomas* in his life-time, at his special instance and request; and for other money by the said *John* before that time lent and advanced to the said *Thomas* in his life-time, at his like request; and for other money by the said *Thomas* in his life-time, before that time had and received, to and for the use of the said *John*; and being so indebted, he the said *Thomas* in his life-time, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised

Quantum meruit.

*Indebtedness of-
sumpsit for
money paid,
lent, had, and
received.*

Declarations in Assumpsit.

Breach.

mised the said *John*, to pay him the said last-mentioned sum of money, when he should be thereto afterwards requested: Yet the said *Thomas* in his life-time, and the said *Richard*, administrator as aforesaid, since his death, (altho' often requested, &c.) hath not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *John*; but the said *Thomas* in his life-time, and the said *Richard* since his death, have and each of them hath hitherto wholly refused, and the said *Richard*, administrator as aforesaid, still refuses to pay the same, or any part thereof, to the said *John*, to the said *John* his damage of 60*l.*, and therefore he brings his suit, &c.

The naming the defendant administrator is a sufficient averment, without setting out that administration was committed to him. *Barn.* 159, 160. *Comb.* 465.

In all cases where the action is against an executor or administrator, *merely as such*, the debt shall be recovered only *de bonis testatoris*, and the damages, which are for the delay, *de bonis testatoris*, *et si non de bonis propriis*. 1 *Roll.* 928. l. 35. 1 *Brownl.* 50.

Conclusion for an administrator during the infancy of an executor.

Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, (to which said *John*, administrator, (a) *with the will annexed*, of all and singular the goods, chattels, and credits, which were of the said *Thomas* at the time of his death, during the minority of the said *Robert Nix* who is now alive, and within the age of 17 years, on the day of , in the

(a) If it be at the suit of an administrator during the infancy of a child or children of a person dying intestate, leave out the words in italics, and say, during the minority of the children or child (naming them) entitled; and who are, or is within the age of 21 years, instead of 17 years. In an action by an administrator *durante minori etate* of *A.* who is no executor, it is sufficient to allege that *A.* is under 21 years. 1 *Ld. Ray.* 667. *Com.* 159.

year

year aforesaid, after the decease of the said *Thomas*, was by *John*, by Divine Providence archbishop of *York*, primate and metropolitan of *England*, in due form of law granted,) but to pay the same, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, hath hitherto wholly refused; and the said *Richard* still refuses to pay the same, or any part thereof, to the said *John*, administrator as aforesaid, to the said *John* administrator as aforesaid, his damage of 60*l.*, and therefore he brings his suit, &c.

And he brings into court here the said letters of administration, *with the will annexed*, of the said *Thomas*, which sufficiently prove to the court here, the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf abovementioned. Add pledges, &c.

If an administrator *pendente lite* bring an action, such an administrator must shew the suit depending in the declaration. So an administrator during the absence of *A.* must shew that *A.* is absent. 6 *Mod. sence*, p. 120. 304. 1 *Salk.* 42.

Yet the said *Robert* in his life-time, and the said *Richard*, surviving administrator as aforesaid, since his death, and one *Robert Doe*, the other administrator of the said *Robert*, and whom the said *Richard* hath survived, (altho' often requested, &c.) have not, nor hath either of them, yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, (to which said *John*, administration of all and singular the goods and chattels, rights, and credits, which were of the said *Thomas* at the time of his death, after the death of the said *Thomas*, to wit, on the 20th day of *March*, in the year aforesaid, by by Divine Providence archbishop of *Canterbury*, primate of all *England*, and metropolitan, in due form of law was granted,) but the said *Robert* in his life time, and the said *Richard* and

Declarations in Assumpsit.

Robert, administrators as aforesaid, since the death of the said *Robert*, and the said *Richard*, surviving administrator as aforesaid, since the death of the said *Robert Doe*, to pay the same, or any part thereof, have and each of them hath hitherto wholly refused; and the said *Richard*, surviving administrator as aforesaid, still refuses to pay the same, or any part thereof, to the said *John*, to the said *John* administrator as aforesaid, his damage of 60*l.*, and therefore he brings his suit, &c. Add the *profert in curia* of the letters of administration to the plaintiff only, as in the first precedent.

Conclusion for a husband and wife where the administration after marriage, and the administration granted by an official.

The date of the administration, and follow the words of the administration exactly.

Yet the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *Thomas* in his life-time, or to the said *Ann*, administratrix as aforesaid, since his death, or to the said *John* and *Ann* since their intermarriage, or to either of them, (to which said *Ann* administration of all and singular the goods, chattels, and credits, which were of the said *Thomas* at the time of his death, after the death of the said *Thomas*, to wit, on the 20th day of *October*, in the year aforesaid, to wit, at *Barking* aforesaid, by (a) the Reverend *John Gray*, Doctor of Laws, the official *parson* lawfully constituted to the worshipful *William Wells*, Doctor of Divinity, Archdeacon of the Archdiocese of *Colchester*, to whom the commission in this behalf belonged, in due form of law was granted; but he to pay the same, or any part thereof, to the said *Thomas* in his life-time, or to the said *Ann*, administratrix as aforesaid, before her intermarriage with the said *John*, or to the said *John* and *Ann*, administratrix as aforesaid, since their intermarriage, or to either of them, hath hitherto wholly refused, and the said *Richard* doth still refuse, to the said *John* and *Ann*, administratrix as aforesaid,

By an arch-deacon.

(a) By E. F. Doctor of Divinity, Archdeacon of the Archdiocese of *Totness*, lawfully constituted, to whom the commission in this behalf belonged, in due form of law was granted.

their

their damage of 50*l.* and therefore they bring their suit, &c. And the said *John* and *Ann* bring into *Profer.* court here the aforesaid letters of administration, which sufficiently prove to the court here the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf above-mentioned.

Yet the said *Richard* (altho' often requested, &c.) Conclusion for an administrator *de bonis non.* in this respect hath not yet paid the said several sums of money, or any part thereof, to the said *Richard Roe* in his life-time, or to the said *Simon Franks*, administrator of the said *Richard Roe* as aforesaid, in his life-time, or to the said *John*, administrator as aforesaid, since the death of the said *Simon Franks*, or to either of them, (to which said *John* administration of all and singular the goods, chattels, and credits, which were of the said *Richard Roe*, unadministered by the said *Simon Franks* at the time of his death, after the death of the said *Simon*, to wit, on the 10th day of *October*, in the year aforesaid, by by Divine Providence lord bishop of *London*, in due form of law was granted,) but he to pay the same, or any part thereof, to the said *Richard Roe* in his life-time, or to the said *Simon*, administrator as aforesaid, in his life-time, or to the said *John*, administrator as aforesaid, since the death of the said *Simon*, or to either of them, hath hitherto wholly refused, and the said *Richard* still refuses to pay the same to the said *John*, administrator as aforesaid, to the said *John* administrator as aforesaid, his damage of 60*l.*; and therefore he brings his suit, &c. Add profer of letters of administration of the goods unadministered, as in p. 104.

Yet the said *Richard* (altho' often requested, &c.) Conclusion for an administrator with the will annexed. *Vide* p. 105. hath not yet paid the said several sums of money, or any part thereof, to the said *Joseph* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, (to which said *John* administration of all and singular the goods, chattels, rights, and credits, which were

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of the said *Joseph* at the time of his death, after the death of the said *Joseph*, with the will of the said *Joseph* annexed, to wit, on the 10th day of *March*, in the year of our Lord 1793, was by

by Divine Providence archbishop of *Canterbury*, primate of all *England*, and metropolitan, in due form of law granted,) but he to pay the same, or any part thereof, to the said *Joseph* in his life-time, or to the said *John*, administrator as aforesaid, since his death, or to either of them, hath hitherto wholly refused, and still refuses, to the said *John*, administrator as aforesaid, his damage of 60*l.*; and therefore he brings his suit, &c. And the said *John* brings into court here the letters of administration aforesaid, with the will of the said *Joseph* annexed, which sufficiently proves to the court here the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf abovementioned.

Proferit.

Notes.

The first and second declaration will be a precedent for others in assumpsit, *by or against an administrator*. In the *latter* case, you have nothing more to state, than that the *intestate* became indebted in his life-time, and that he undertook and promised to pay, and that the *day of his being indebted* must be laid in his life-time. The conclusions are the only variation.

Promissory

Promissory Notes.

Promissory Notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large; and at first these notes were considered only, by the common law, as written evidence of a debt; for it was held, that a *promissory note*, was not assignable or indorseable over, within the custom of merchants to any other person, by him to whom it was made payable; and that if, in fact, such a note had been indorsed, or assigned over, the person, to whom it was so indorsed or assigned, could not maintain an action within the custom against the person who first drew and subscribed the note; and that, within the same custom, even the person to whom it was made payable, could not maintain such an action. *Vide 1 Salk. 129.* But at length they were recognized by the legislature, and put on the same footing with bills of exchange, by the *stat. 3 & 4 Ann. c. 9*; which enacts, that after the first of May 1709, "All notes in writing made by any person, body politic or corporate, or by the servant or agent of any trader usually intrusted to sign notes for his master, whereby such person, &c. promises to pay to another, or his order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c. to whom the same is made payable; and every such note shall be assignable, or indorseable over, in the same manner as inland bills of exchange: and that the person, &c. to whom such sum is by such note made payable, may maintain an action for the same, in the same manner as they might do, on an inland bill of exchange. And that any person, &c. to whom

Every such note shall be assignable as inland bills, and the person to whom same is made payable may bring an action, as may likewise

the indorser
against the in-
dorsee.

such note is indorsed, or assigned, or the money therein mentioned, ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the *person, &c.* who or whose agent signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange; and, in every such action, shall recover his damages and costs; but if nonsuited, or verdict against him, the defendant shall recover his costs.

What is required
by the note.

The note is required to be in writing, and drawn by the party, or those having a legal authority from him; and such drawing, raises a contract to pay the money, without any express promise. *Salomon v. Carib. 510. 1 Ld. Ray. 538.* If it is wrote by the plaintiff, and signed by the defendant, it is within the act, for the signing or subscribing as the *lien*, and the writing or making, is only the mechanical part of it. *2 Bac. Abr. 306. 11 V. Baren.* The object of the act was to put promissory notes on the same footing, with bills of exchange; therefore it is now held, there shall be allowed three days grace, on promissory notes, as well as on bills of exchange. There are no precise words requisite to make a promissory note, it is enough if it may be brought within the intention of the act. *Str. 629. Marri. v. Lee, 1 Ld. Ray. 1396.* And it may be made payable to *A.* only, or to *A.* or order, so many days after date, or on demand. The former cannot be indorsed over, but the latter may.

Payee has a pro-
perty in note,
and may indorse.

The payee of a promissory note, has a clear property vested in him (not indeed in possession, but in action) by the express contract of the drawer; and this property, so vested, may be transferred and assigned, from the payee to any other man; contrary to the general rule of the common law, that no *chose in action* is assignable; which assignment is the life of paper credit. The payee, or person to whom or whose order such promissory note is payable, may, by indorsement, or writing his

his name *indorse*, or on the back of it, assign over his *whole* property to the bearer, or else to *another person* by name, either of whom is then called the *indorsee*; and he may assign the same to another, and so on in *infinitum*. And a promissory note, payable to *A. or bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it. 2 *Show.* 235. *Grant v. Vaughan*. And in case of non-payment, by the drawer, the several *indorsees*, of a promissory note, have the same remedy, as upon bills of exchange, against the *prior indorsers*. Notes payable to bearer negotiable.

When the *payee* indorses the note, he does it by the law of merchants, being a *chose in action*, not assignable by the general law; and the indorsement is part of the original contract, and is incidental and appurtenant to it in the nature of it, and must be understood and interpreted to be made in the same manner, and with the same privileges, qualities, and advantages, as the original *payee* held it; that is, as an assignable, negotiable note, which he may indorse over to another, and that other to a third, and so on, at pleasure. *Wilmot, J.* And the last indorsee has his remedy against the *drawer, payee, and every other indorser*, by several actions; and if the drawer wishes to pay, he must pay the costs of all the actions; but if any of the indorsers apply to pay, he will be liable to the debt, with the costs of the action, as against him. And the plaintiff may go on as against the drawer and the other indorsers, for his costs. 4 *Term Rep.* 691. *Smith v. Woodcock*. As to the indorsement. *Windham v. Trull, 1 Str.* 215.

The note need not state *value received*, for as these instruments are always presumed to have been made on a valuable consideration, words which import no more, cannot be essential. *White v. Ledwith. H. 25. Geo. 3. K. B. Vide, Fortesc. Rep.* 282. 8 *Mod.* 267. *Show.* 5. 2 *Ld. Ray.* 1556. *Contra, 2 Str.* 1212. *Banbury v. Lister*.

The note itself is evidence of a consideration, yet it is not conclusive evidence, but turns the proof upon Note evidence of consideration, but not conclusive.

Declarations in Assumpsit.

upon the defendant, to shew that there was *no consideration given* for such note; and so he can shew, that it is still but a simple contract, and therefore but a *nudum pactum, unde non oritur actio*. 1 *Solk.* 129. *Clark v. Martin*, and *Postler v. Pearson*, *Gilb. Eq. Rep.* 154. *Brown v. Marsh*. *Vide* 2 *Ld. Ray.* 1556.

Must be for payment of money absolutely.

What notes are not good.

The object of the act of 4 *Ann.* was to put promissory notes on the same footing with bills of exchange, in every respect. It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out in the world, incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation, were obliged to inquire, when these uncertain events would probably be reduced to a certainty; therefore a note promising to pay within so many days after the defendant should marry, is not good, for the defendant may never marry, and so the note is contingent. 2 *Str.* 1151. *Beardley v. Baldwin*. A promise to pay 50l. or render the body of J. S. to prison, before such a day, this is not good, because the money is not absolutely payable, but depends upon a contingency, whether he would surrender J. S. to prison or not. *Smith v. Adams*, 2 *Ld. Ray.* 1362. So a promise to pay to J. S. if J. S. doth not pay it within six weeks, is not within the act, because the drawer was not the original debtor, but might be a debtor on contingency. 8 *Mod.* 363. *Appley v. Riddolpb.* So a promise to deliver up horses and a wharf, and pay money at a particular day, is not within the statute. *Martin v. Chauntry*, 2 *Str.* 1271. So a promise to pay 200l. to B. or order in three good *East India* bonds, is not a note within the statute. *Bull. N. P.* 268. *Morse v. Vanluta*. A contingent note, where it is uncertain whether the money shall ever become payable at all or not, is not within the statute. *Goff v. Nelson*, 1 *Burr.* 226. *His promise to pay to A. B.* 1161, 115. *value received on the death of George Henshaw, provided by leaves either of us sufficient*

saient to pay the said sum, or if he shall be otherwise able to pay it; signed by one only, held not negotiable. *Roberts v. Peake*, 1 Burr. 323; being only eventual, not absolute, and judgment for the defendant. A promissory note to pay "out of defendant's money, that should arise from his reversion of 43l. when sold," was held not to be a note within the stat. *Carles v. Fancourt*, 5 Term Rep. 482.

But promissory notes are good, if they be certainly, and at all events payable, at a certain time. — ^{What notes are good.}

Therefore a promise to pay, "within two months after such a ship is paid off," has been holden good, for the paying off a ship, is a thing of a public nature. *Andrews v. Franklin*, 1 Str. 24. So a promise to pay "six weeks after the death of the defendant's father, for value received," is good, for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. *Cook v. Coleham*, 2 Str. 1217. So a note given to an infant, "payable when he shall come of age, specifying the time 12th of June 1750," so it would have been good had it been "payable 12th of June 1750," without mentioning the plaintiff's being then to come of age. The former part of the note is a promise to pay the money, the rest fixes the particular time, when it is to be paid. It is enough, if it be certainly, and at all events, payable at that time. *Goss v. Nelson*, 1 Burr. 226. So a note was "to pay on the receipt of wages due from his majesty's ship the Suffolk, it being in full for his wages and prize money, and short allowance money for the said ship." *Evans v. Underwood*, 1 Wils. 262. So a promise by A. to pay "so much to B. for a debt due from C. to said B." *Poppelwell v. Wilson*, 1 Str. 264. So acknowledging to have received "certain bonds and notes, and to be indebted in the balance, which the maker of the note promised to pay. *Chadwick v. Allen*, 1 Str. 706. "I promise to account with T. S. or his order for value received by me." In an action by the

indorsee

indorse, against the *drawer*, the court held, that the word *accountable* in this case, shall be taken to pay; and the difference is, when it is to be accountable for so much money, value received, and when it is value received, on account, or on account, or as per account, as is usual between merchant and factor, or, lord and steward, and it would be dangerous to the credit of those notes, if this should not be good. *Morris v. Beaumont*, 11 T. R. 362.

In its original shape, it bears no resemblance to a bill; when indorsed, otherwise.

While a *promissory note* continues in its original shape of a promise, from one man to pay another, it bears no similitude to a bill of exchange; when it is indorsed, the resemblance begins, for then it is an order by an indorser, upon the maker of the note (his debtor by the note), to pay to the indorsee. Lord Mansfield. 2 Burr. 676. *Hutton v. Adamson*.

Notes and bills given for a less sum than 5l. how to be made.

All *promissory* or other notes, bills of exchange, or draughts, or undertakings, in writing, being negotiable or transferable, for the payment of 20s. or for any sum above that, and less than 5l. or on which 20s. or above, and less than 5l. shall remain undischarged, issued after 1st January, 1778, shall specify the names and places of abode of the person or persons, to whom, or to whose order they shall be made payable, and shall bear date, before or at the time of drawing or issuing them, and not on any subsequent day; and shall be made payable within the space of 21 days next after the day of the date; and shall not be transferable, or negotiable after the time limited for the payment; and every indorsement shall be made before the expiration of that time, and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons, to whom, or to whose order the money is to be paid; and the signing of every such note, &c. and also of every indorsement, shall be attested by one subscribing witness at the least; and all notes, &c. of the above description, not having these requisites, shall be utterly void. 17 Geo. 3. c. 30. s. 1.

Indorsement,

And all negotiable notes, &c. for any sum between 20s. and 5l., or for 20s. or less than 5l.; which shall remain undischarged, and which shall be issued, in England, at any time after 1st of January 1778, in any other manner than as aforesaid; and also every indorsement, on any such note, &c. to be negotiated other than aforesaid, are declared void. *Sec. 3.* Made perpetual by 27 Geo. 3. c. 16. Foreign bills, drawn abroad, and payable here, are evidently not subject to any duty.

All notes, bills, &c. where the whole, or any part of the consideration, shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game whatsoever, or by betting on the sides or hands of such as do game, at any of the games aforesaid, or for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent and advanced at the time or place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, and of no effect. 9 Ann. c. 14. s. 1. As they are void, may plead the general issue, and give the Special matter in evidence.

Between 20s. and 5l. or for 20s. or less than 5l.

Notes on bills won by gaming.

Duties on Notes and Bills.

31 Geo. 3. c. 25. *Duties on bills of exchange, drafts, or orders for the payment of money on demand.*
after 1st August 1791. S. 2.

For any sum amounting to 40s. not exceeding 5 guineas, 0 2 6
exceeding 5 guineas and not exceeding 30s. 0 4 6
above 30s. and not exceeding 50s. 0 6 6
above 50s. and not exceeding 100s. 0 8 6
above 100s. and not exceeding 200s. 1 0 6

Duties on bills of exchange, drafts or orders payable otherwise than on demand, and promissory notes or other notes, payable otherwise than to the bearer on demand.

For any sum amounting to 40s. not exceeding 30s. 0 2 6
exceeding 30s. not exceeding 50s. 0 4 6
exceeding 50s. not exceeding 100s. 0 6 6
exceeding 100s. not exceeding 200s. 0 8 6
from 200s. upwards. 1 0 6

Duties on promissory or other notes, payable to the bearer on demand, and re-issuable from time to time, after payment at the place where they were first issued.

For sums amounting to 40s. not exceeding 5 guineas, 0 2 6
exceeding 30s. not exceeding 50s. 0 4 6
exceeding 50s. not exceeding 100s. 0 6 6
exceeding 100s. not exceeding 200s. 0 8 6

Duties on promissory notes, or other notes, for the payment of money to the bearer on demand, re-issuable from time to time, after any payment at the same place, or any other place, than where it was first issued. Sect. 8.

For sums amounting to 40s. not exceeding 5 guineas, 0 2 6
exceeding 5 guineas, not exceeding 30s. 0 4 6

With respect to foreign bills, drawn here in sight, according to the custom of merchants, every bill of each set, is subjected to a stamp duty, as under:

Sect. 3.

For sums not exceeding 100s. 0 0 6
For sums exceeding 100s. not exceeding 200s. 0 0 9
For sums exceeding 200s. 0 1 0

The

The duties are payable by the *drawers or makers of the bills and notes respectively*, and must be stamped before drawn.

Drafts or orders payable to bearer on demand, bearing date on or before the day on which the same are issued, and at the place from which the same are drawn and issued, and drawn on any banker or bankers, or person or persons, acting as a banker or bankers, and residing and transacting the business of a banker *within 10 miles of the place*, where such draft or order shall be actually drawn and issued, are exempted from duty. *Sec. 4.*

No bill, &c. shall be available in law or equity, unless stamped with the lawful stamp. And that it shall *not* be lawful for the commissioners to stamp any paper, &c. *after any bill, &c. shall be written thereon, under any pretence. Sec. 19.* And Persons drawing bills, &c. contrary to this act, to be answerable for the duty. *Sec. 6.*

Where these promissory notes, &c. shall be paid by the person, by whom the same shall have been made or signed, and first issued or negotiated, and at the place where the same were first issued, &c. the person so paying the same, notwithstanding such payment, may at any time afterwards, and so often as there shall be occasion after every such payment thereof, but not otherwise, again issue and negotiate such notes; and every such note is declared to be after payment, but not otherwise, issuable and negotiable. But if such notes shall be paid by any other than the person making or signing the same, or at any place other than the place of issuing, such note shall be construed to be vacated and satisfied, and shall be no longer negotiable but cancelled; and if any person shall again enforce any such note, after payment by any person, other than the person making the same, or at any place, other than the place of issuing; or if any person, named in such note for payment thereof, shall after payment, neglect or refuse to cancel the same, such person shall forfeit 20*l.* And if any such

Orders on bankers within ten miles of the place of drawing, payable to bearer on demand, exempt from duty.

No bill to be read in court unless stamp.

Regulations respecting notes, re-issuable only at the place where first issued.

Declarations in *Stamp Act*.

such note shall not be cancelled, then, and as often as it shall be again issued, there shall be due, answered, and paid, the like duty as was first charged on such note, to be payable by, and be charged on the person who shall again issue and negotiate such note. *Stat. 7.*

Notes re-issued payable to the holders, &c.

Every promissory or other note, payable to the bearer on demand, which shall be issued after payment under this act, shall notwithstanding be payable to the person holding the same, and such person may maintain an action thereupon. *Stat. 9.*

Penalty signing unstamped bills.

There is a penalty of 20*l.* for signing an unstamped bill, or promissory note, draft or order, liable to any of the said duties or accepting a bill. *Stat. 10.*

No person to make any bills, but as might have lawfully been done before.

No person shall have power to make any bills of exchange, notes, &c. for the payment of any sum, in any other manner than they might have lawfully made before the passing this act, and as if this act had not been passed. *Stat. 11.*

Limitation of the action.

Promissory notes, are *not* of so high a nature as bonds, or specialties, but are *simple contract debts*; and being within the stat. 21 Jac. 1. c. 16. so action can be brought for money due thereon, after six years from the time the same became due; unless it be under particular exceptions, as with respect to infants, persons beyond sea, &c. or unless the debt hath been revived, by the debtor's acknowledging the same, and promising payment. *Vide stat 3 & 4 Ann. c. 9.*

If several drawers, acknowledgment by one.

If there be several drawers of a joint and several note, the acknowledgment of one of them, takes it out of the statute, as against the others; and may be given in evidence, on a separate action, against any of the others. *Dough. 652. Whitcomb v. Whiting.*

Acknowledgment of debt after action brought, takes it out of statute.

In an action on a promissory note, where the statute of limitations was pleaded, it appeared, that the defendant was a surety in the note for one T. S., and six years were elapsed since the note given; but, on a demand within the six years, defendant

Tenant said, "you know I had not any of the money myself, but am willing to pay half of it." This promise, the court held, took it out of the statute. *Via v. Fouraker*, 2 Burr. 1099. Bull. 149. S. C.

I shall now shew a declaration upon the following promissory note, by the payer, against the drawer, and afterwards the declaration by the indorsee against payee, and by the indorsee against indorser.

London 21st September, 1794.

One month after date, I promise to pay Mr. John Denn or order one hundred pounds, for value received. Richard Fenn.

And London, to wit, John Denn complains of Richard Fenn, being in the custody of the marshal, of the Marshalsea, of our lord the now king, before the king himself, For that whereas, the said Richard, on the 21st day of September, in the year of our Lord 1794, to wit, at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the said John, and thereby, one month after the date thereof, promised to pay to the said John, by the name of John Denn, or order 100l. for value received; by reason whereof, and by force of the statute, in such case made and provided, the said Richard became liable to pay, to the said John, the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said Richard, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and faithfully promised the said John, to pay him the said sum of money, mentioned in the said note, according to the tenor and effect of the said note: And whereas, the said Richard, afterwards to wit, on the 24th day of October, in

The payee against the drawer on a promissory note.

Indebitatus assumpsit for money laid out, mo-

Declarations in Assumpsit.

ney had and received, and money lent.

the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *John* in 150*l.* of lawful money of *Great Britain*, for money by the said *John* before that time paid, laid out, and expended, for the said *Richard* at his special instance and request; and for other money by the said *Richard*, before that time had and received to the use of the said *John*; and for other money by the said *John*, before then lent and advanced to the said *Richard*, at his like request; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested: Yet the said *Richard* (although often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John*; but to pay the same, or any part thereof, to the said *John*, hath hitherto wholly refused, and still refuses, to the said *John* his damage of 120*l.*; and therefore he brings his suit. &c.; pledges, &c.

Breach.

Notes.

In assumpsit, note may be given in evidence.

In common cases, upon *assumpsit* for money, the plaintiff may give a *promissory note* from the defendant in evidence; for the stat. 3 & 4 Ann, which enables the plaintiff to declare upon the note, only gives an *additional* remedy. *Ball. N. P.* 134. *Vide* 1 *Lut.* 1585. *Bromwich v. Lloyd*, cited in 2 *Str.* 722. 725.; where *Raymond, C. J.* says, this note might have been given in evidence upon the *indeb. assump.* for the note imports the drawer having so much money of the others in his hands; and though it may not be allowed in evidence in such case as a promissory note, without further proof of the consideration; yet it may undoubtedly be given in evidence on an *indebitatus assumpsit*, as a paper,

of paper or writing, to prove the defendant's receipt of so much money from the plaintiff. *Vide Hard's Case, Salk* 223.

In an action against the *drawer* of a promissory note, the declaration is to state, the *very day* on which the note is dated. *Matthews v. Spicer, 1 Str.* 22. *1 Salk.* 222. 2d, That the *drawer made payee, the note*, and thereby *promised to pay*; and that the *drawer delivered* it to the *payee*, but it seems that it is not absolutely necessary to state an *express promise* by the defendant; and therefore it will be sufficient after stating the circumstances, to say, that by these he became liable to pay. But it is usual to alledge an *express promise* after stating the liability, that no exception may be taken to the addition of *other counts* in *assumpsit*, which are usually added. *1 Vent.* 153. *1 Salk.* 24.

On the trial the plaintiff must prove, the *defendant's hand-writing*, and if there be a *witness* to the note, the witness must prove it; if he be dead, his death must be proved by a *copy of the register, or otherwise*, as by being at his burial, &c. But if judgment be taken by default, and an *inquiry executed*, it is now a settled point, that in an action upon a *promissory note or bill of exchange*, the sum due thereon is admitted, and need not be proved, but the note must be produced to the sheriff, and jury, to see whether any part of it has been paid. *3 Wilson* 155. *Anon. per Gould, J. 3 Term Rep.* 303. *Greene v. Hearn, S. P.* And in the case of *Bewis v. Lindfell, 2 Str.* 1149, the court held, the note being set out in the declaration is admitted, and the only use of it is to see, whether any money is indorsed to be paid upon it.

In an action by the *payee* of a note against the *drawer*, the note was produced, and had the *payee's* name on the back; it was insisted, on the part of the defendant, that, that was an indorsement. The judge allowed it to be struck out in court, for being in blank, no property was transferred. *Theob v. Lovell, 2 Str.* 1103.

D d

The

*Facit action per
quam promissit
solvere, impensam
a signing.*

The plaintiff declared that defendant made his certain note in writing, by which he promised to pay, and exception was taken, that here was no signing by defendant. The court held it well enough, for unless it was signed, or wrote by him, it could not be such a note, whereby the defendant promised to pay. *Ellist v. Cooper*, 1 Str. 609. 8 Mod. 307. 2 Ld. Ray. 1376.

The drawer liable to the indorser, although note was once paid by the payee to the indorser, it being a second time delivered for goods sold.

A note was drawn by the defendant *Bekeley*, payable to *Collison and Co.*, who indorsed it to the plaintiff; that afterwards *Collison and Co.* took it back again, and paid the plaintiff his money for it; that after this, plaintiff sold goods to *Collison and Co.*, who a second time gave the plaintiff the same note for payment, and afterwards *Collison and Co.* failing, plaintiff brought an action against the drawer. Jury found for defendant, because the note had been once taken up and paid. And on motion for a new trial, court held, the drawer liable, and granted it. *Gomez, Serra v. Bentley*, 1 Will. 46. For it appeared to the plaintiff that the defendant was still liable to *Collison and Co.*, when they paid him this note a second time, and the plaintiff ought to stand in their place.

The first indorser against drawer, on the like note.

Middlesex, to wit. *Thomas Doe* complains of *Richard Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, For that whereas, the said *Richard*, on the 21st day of September, in the year of our Lord 1794, to wit, at *Westminster*, in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to one *John Doe*, by which said note, the said *Richard*, one month after the date thereof, promised to pay to the said *John*, or order, 100*l.* for value received; and the said *John*, to whom, or to whose order, the payment of the said sum of money, mentioned in the said note, was by the said note, to be made after

Indorsement by the payee to the plaintiff.

after the making thereof, and before the payment of the money in the said note specified, or of any part thereof, to wit, on the day and year aforesaid, at *Westminster* aforesaid, indorsed the said note, his own hand being thereon subscribed; by which indorsement the said *John* ordered and appointed the said sum of money, specified in the said note, to be paid to the said *Thomas*, and then and there delivered the said note, so indorsed, to the said *Thomas*; of which said indorsement, the said *Richard*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice; by reason whereof, and by force of the statute, in such case made and provided, the said *Richard* became liable to pay to the said *Thomas*, the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon, as aforesaid; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised, the said *Thomas*, to pay him the said sum of money, mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid: And whereas the said *Richard*, afterwards to wit, on the 24th day of *October*, in the year aforesaid, at *Westminster* aforesaid, was indebted, &c. *Add a count for money lent, and common conclusion, as in the other precedent.*

Notes.

The payee of a note, or the person to whom the note is payable, must from the nature of the transaction, be the first indorser. The usual way of indorsing a note, is by putting the name of the payee on the back of it, or sometimes by adding words to it, "pay the contents to A. B.," and signed by the payee, and such indorsement transfers the property, without the words "or order,"

The payee is the first indorser over.

How to indorse at trial.

Declarations in *Assumpsit*.

and at the trial the words "*or order*" may be added. *Com.* 160. *Vide* 2 *Burr.* 1216; where it was held, that the words "*or order*" are not necessary to be inserted in the indorsement, any more than "*executors or administrators*" are necessary to be added to it. *Edie and an. v. East India Comp.* *Vide Moore v. Marning, Com.* 311. *Acheson v. Fountain, 1 Str.* 557. The general law is, that the indorsement will follow the nature of the original note, and be an *absolute* assignment to the *indorsee* or his *order*.

What necessary to state in the declaration.

In an action by the *first indorsee* against the *drawer*, an indorsement by the *payee* must at all events be stated in the declaration, because without that, it cannot appear that he made any order, on the existence of which depends his title.

If indorsement be special.

If the first indorsement be *special*, to any person by name, in an action by an indorsee after him, his indorsement must for the same reason be stated; so also must all special indorsements.

Proof.

In this action the *drawer's hand-writing* must be proved, as well as the *payee's*, and it is usual to indorse over the payee's name *before trial*, "*pay the contents to Thomas Doe.*"

The payee's hand must be proved.

In an action by the *indorsee* against the *drawer* upon *non assumpsit*, the plaintiff proved the drawer's hand; and that when the note, with the indorsement, was shewn to the indorser, *he acknowledged it was his hand-writing*; this was holden to be *not sufficient* to charge a *third person*, but that the indorsement must be proved. *Hemming v. Robinson, M. 6. Geo. 2. Bull.* 269. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid. *Barnes* 436.

Cannot be indorsed for part.

A note cannot be indorsed over *for part of the sum drawn for*, for that would subject the drawer to several actions, upon a contract which is *intire*.
1 *Ld.*

1 *Ld. Ray.* 360. *Salk.* 65. 12 *Mod.* 213. *Hawkins v. Gardiner.* But the holder may have his action for part, if he acknowledge satisfaction for the rest; and where the drawer has paid part, it may be indorsed over for the residue.

London, ff. John Burn complains of *Thomas Doe*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, one *Richard Fenn*, on the 21st day of *September*; in the year of our Lord 1794, to wit, at *London* aforesaid, in the parish of *St. Mary-le-Bow*; in the ward of *Cheap*, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Thomas*; and thereby, one month after the date thereof, promised to pay to the said *Thomas*, or order, 100*l.* for value received; and the said *Thomas*, (a) to whom, or to whose order, the payment of the said sum of money, contained in the said note, was to be made afterwards, and before the payment of the said sum of money in the said note specified, or of any part thereof, and also before the time appointed by the said note for the payment thereof, to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, indorsed the said note, his own proper hand being thereon subscribed, by which said indorsement, the said *Thomas* ordered and appointed the said sum of money, in the said note specified, to be paid to the said *John*, and then and there delivered the said note, so indorsed, to the said *John*, of which said indorsement, so made on the said note as aforesaid, the said *Thomas*, afterwards to wit, on the day and year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, had notice: and the said *John Burn* avers, that afterwards, and after the expiration of

(a) The payee, or person to whom the note is made payable, must, from the nature of the transaction, be the first indorser.

The day the
note is payable,
giving the days
of grace.

the said one month, in the said note mentioned, to wit, on the 24th day of *October*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, he the said *John Burn*, shewed and presented the said note, with the said indorsement so made thereon as aforesaid, to the said *Richard Fenn*, and then and there requested the said *Richard*, to pay to him the said *John Burn*, the said sum of money contained in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; but the said *Richard*, did not then, or at any other time afterwards, pay the said sum of money in the said note mentioned, or any part thereof, to the said *John Burn*; but then and there wholly refused to pay the same, or any part thereof, to the said *John*; of all which said premises, the said *Thomas*, afterwards to wit, on the day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, had notice, by reason whereof, and by force of the statute, in such case made and provided, the said *Thomas* became liable to pay to the said *John Burn*, the said sum of money contained in the said note, when he should be thereto afterwards requested; and being so liable, he the said *Thomas*, in consideration thereof, afterwards to wit, on the same day and year last aforesaid, at *London* aforesaid, in the parish and ward aforesaid, undertook, and then and there faithfully promised the said *John Burn*, to pay him the said sum of money contained in the said note, when he should be thereto afterwards requested; And whereas, the said *Thomas*, afterwards to wit, on the same day and year last aforesaid, at *London*, &c. Add a count for money lent, and conclusion.

Second count.

Notes.

The innocent indorsee of a gaming note, cannot maintain an action against the drawer.

An action by the plaintiff as indorsee of several promissory notes, it appeared, that the notes were given by the defendant to one *John Church*, for money by him knowingly advanced to the defendant.

sendant to game with at dice, and that Church indorsed them to the plaintiff for a full and valuable consideration; and that the plaintiff was not privy ^{9 Ann. c. 24.} to, or had any notice, that any part of the money, for which the notes were given, had been lent for the purpose of gaming. Question was, Whether plaintiff could maintain this action? The court were of opinion, that he could not; for it is making it of some use to the lender, if he can pay his own debts with it; and it will be a means to evade the act, it being so very difficult to prove notice on an indorsee. And tho' it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side. And the plaintiff is not without remedy, for he may sue Church on his indorsement; and it is but the common hazard of taking notes of infants, or some covert. *Bowyer v. Bampton*, 2 Str. 1155.

It is now determined, that there are ^{Three days grace allowed.} three days of grace allowed on promissory notes, for the Stat. 3 & 4 Ann. which first made them negotiable, has put them in every respect on the same footing with bills of exchange. *Brown v. Haraden*, 4 Term Rep. 128.

A promissory note, or bill of exchange, given upon ^{Usurious consideration.} usurious consideration, is void, even in the hands of an indorsee for a valuable consideration, without notice of the usury. *Low v. Waller*, Doug. 735.

When a promissory note is indorsed, the resemblance between that and a bill of exchange, begins; the maker of the note is the acceptor, and the indorser is the person to whom it is made payable.

The indorser only undertakes in case the maker of the note does not pay.

The indorsee is bound to apply to the maker of the note for payment, before he calls on the indorser; he takes it upon that condition; and therefore must in all cases know who he is, and where he lives; and if after the note becomes payable he is guilty of neglect, and the maker becomes insolvent, he loses ^{Indorsee of a note, must call on the drawer before indorsee liable.}

Declarations in Assumpsit.

loses the money, and cannot come upon the indorser at all. Therefore, before the indorsee of a promissory note brings an action against the indorser, he must shew a demand, or due diligence to get the money from the maker of the note; just as the person to whom the bill of exchange is made payable must shew a demand, or due diligence to get the money from the acceptor, before he brings an action against the drawer. *Ld. Mansfield. Heylin & al. v. Adamson, 2 Burr. 676. 678. 1 Ld. Ray. 443.*

Declaration, what it ought to state.

Vide Dougl. 681.

What a verdict will or not cure.

No excuse for the not demanding the money, that the drawer is a bankrupt.

If indorsee has paid part, no demand is necessary on the drawer.

As between drawer and payee, consideration for the note

To make good the declaration by the indorsee against the indorser on a note, it is necessary to state, 1. *The demand of payment on the drawer, and a default by him;* and 2. *Notice to the defendant of the drawer's refusal to pay;* otherwise the plaintiff cannot sustain the action, nor will a verdict cure it. *Rushton v. Aspinall, Dougl. 679.* For a verdict will not mend the matter, where the *gist of the case* is not laid in the declaration, but will *cure ambiguity.* *Ibid. 683.* No proof at the trial can make good a declaration, which contains *no ground of action* on the face of it. *Ibid. Vide 1 Str. 649.* After verdict *nothing* is to be presumed, but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated. *Spirr v. Parker, 1 Term Rep. 141. 145. Buller, J.*

It is not an excuse for not making a demand on a note or bill, or for not giving notice of non-payment, that the drawer, or acceptor, has become a bankrupt, as many means may remain of obtaining payment, by the assistance of friends, or otherwise. *Ld. M. Dougl. 515. Russell v. Langstaff.*

In an action on a promissory note, by the indorsee against the indorser, it was proved, that the defendant had paid part of the money. *Lee, C. J.* held that sufficient to dispense with the proving a demand upon the maker of the note. *Vaughan v. Fuller, 2 Str. 1246.*

As between the drawer and payee of the note, the defendant will be permitted to *impeach the promise*, and go into the consideration, as to shew it was illegal,

illegal, viz. "that it was given on a smuggling consideration," *Guichard v. Roberts*, 1 *Black. Rep.* 445.; or to shew that it was delivered "as an escrow; ex. gr. as a reward for procuring the defendant to be restored to an office, which plaintiff did not effect," *Jafferries v. Austin*, 1 *Str.* 674.; in which case the plaintiff could not recover. But where the action was by the indorsee against the indorser, C. J. Raymond would not suffer the defendant to give in evidence, that the plaintiff desired him to indorse the note to enable him to bring an action against the drawer of the note, and had promised that he would sue him. *Snelling v. Briggs*, *Bull.* 274.

may be gone into;

but if by an indorsee against indorser, cannot go into consideration.

The plaintiff being engaged in a marriage treaty, the defendant his brother, to assist him in his design, and to represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between them, tho' no such balance existed. It was held, that where, upon proposals of marriage, third persons make representations different from the truth, they shall be bound to make them good, and held defendant chargeable. *Montefiori v. Montefiori*, 1 *Black. Rep.* 363.

If a person gives a note to aid another in fraud, such note shall be absolute against him.

The indorsee of a note may maintain an assumpsit for money lent against the person who indorsed such note to him. *Kessebower v. Tims*, *Bayley* 47. *E.* 22 *Geo.* 2.

Indorsee may have indebitatus assumpsit for money lent against indorser.

In an action by the indorsee of a note against the indorser, it appeared, the plaintiff had, after the indorsement, received part of the drawer of the note; and held to be a taking upon himself to give the whole credit to the drawer, and absolutely discharged the indorser. *Kellock v. Robinson*, 2 *Str.* 745. The indorser of a note is only a warrantor thereof that the drawer will pay it, and if he does not, the indorser will. 1 *Wils.* 48. *Hull v. Pitfield*.

If indorsee receives part of the drawer, indorser is discharged.

If the drawer be sued by the indorsee, and his bail pay the money and costs, this discharges the indorser, as much as if the drawer himself had paid it. *Hull v. Pitfield*, 1 *Wils.* 46.

If drawer's bail pay, discharges indorser.

As

As to Demand of the Drawer.

Proof of the
drawer's drawing
on note, not
sufficient.

A note was payable 27 Dec. 1732. The drawer shut up his house, and went away the following before: the plaintiff proved the shutting up the house. C. J. held, he had not gone far enough, but ought to show, that he had inquired after the drawer, or attempted to find him out; and that a demand on the drawer was necessary. *Collis v. Butler*, 2 Str. 1037. 1 Ld. Ray. 443. *Lambert v. Carter*, Bull. 169. But if the proof had been of the inquiry, and could not be found, this would have been good.

Notes made
payable at a
banker's.

It is the constant practice to make country bank bills and notes payable in London, and tho' the persons, at whose houses they are payable, are not parties to them, nor personally liable, yet that an answer at such houses, as to the payment or non-payment of the bills or notes made payable there, is sufficient. *Lord Kenyon. Stedman v. Gosh, Sitt. B. 33 Gr. 3.*

Letters of an
indorser, not to
impeach the
indorsee's title.

In an action by the indorsee against the maker of a note, it was held, that the letters of the indorser are not admissible to impeach the indorsee's title. *Ld. K. Clifton v. O'Brien, Sitt. B. 33 Gr. 3.*

The proof on
this declaration.

The proof on this declaration is, 1. The drawer's hand-writing. 2. The demand of the money on him in due time. 3. The payee's hand-writing on the back of the note, being the indorsement to the plaintiff.

If creditor for
a bill accepts
same or bill for
his debt, he
cannot com-
mence an action
till due, unless,
&c.

If in payment of a debt, the creditor is content to take a bill or note payable at a future day; he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment; but if such note or bill is drawn on a person who has no effect in his hands, and who refuses it, in such case he may consider it as waste paper, and resort to his original contract, and sue the debtor for it. *Stedman v. Gosh, Ld. K.*

An action by the *indorsee* of a promissory note against the *indorser*. The note was dated 21 August 1784, and made by one *Donaldson* for 35*l.*, payable ~~for weeks after date~~. It became due 5 October, allowing for the three days grace. *Howell*, the plaintiff's clerk, called on *Donaldson* at ten in the morning; not finding him at home, he left word the note was due, and desired him to send for it at his master's, where it lay, and take it up. That, on the next day the 6th, he called again on *Donaldson*, who told him he would take it up that day: he called again the 7th, and not finding him at home, he was sent to defendant *Brown* to tender the note, who refused, saying, that plaintiff had made it his own. *Donaldson* proved, that immediately on his parting with *Howell* on Wednesday the 6th, he went to *Brown*'s house; not finding him at home, he left a message with his wife, that the note was due, that he, *Donaldson*, could not pay it, and desired *Brown* would take it up, adding, that he would make it up to him. All the parties lived at *Bristol*, within twenty minutes walk of each other. *Verdict* for plaintiff—Motion for a new trial. *Lord Mansfield*: Certainty and diligence are of great importance in mercantile transactions. It is extremely clear, that the holder of a bill, when dishonored by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the post, &c. But, wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one, for the sake of certainty. Here an earlier notice might certainly have been given, as all the parties lived within twenty minutes walk of each other. The note was dishonored on the 5th, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day, and the

If the holder give time to the drawer of a note, after it has been dishonored, the indorser is discharged.

Notice of its being dishonored must come from the holder.

What is reasonable notice to the indorser of non-payment by the drawer, is a question of law.

Declarations in *Assumpsit*.

the plaintiffs did not go at four that afternoon, but waited till the next day. It has been held, that where the party liable does not live *in the same place*, the holder must *write by the next post after the bill is dishonored*. For the sake of diligence and certainty, I am opinion there should be a new trial. *Willes, J.* I am of opinion the plaintiffs have not acted with legal diligence. *Asbhurst, J.* It is of dangerous consequence to lay it down as a general rule, *that the jury should judge of the reasonableness of time*; it ought to be settled as a question of law. If the jury were to determine this question on *all cases*, it would be productive of endless uncertainty: the *next day, at the most*, is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time; if at a greater, *they should write by the next post*. Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say, that the maker does not intend to pay, but that he (the holder) *does not intend to give credit*. In the present case, there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the drawer. *Buller, J.* The *reasonableness of time* is a *question of law*, and *not of fact*. Whether the post goes out this, or that day, at what time, &c. it then becomes a question of law on those facts, what notice shall be reasonable. As to giving time, the holder does it at his peril; and that circumstance alone would be sufficient to decide this case: for in no case has it been determined, that the *indorser is liable after the holder of the note has given time to the maker*. With respect to notice, I concur in the opinion which has been given by the court, and particularly for the reason given by my brother *Asbhurst*. The purpose of giving notice, is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but to render him
liable,

liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if, in the present case, the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged, because it would have amounted only to this, "*The note made by Donaldson, and indorsed by you, is not paid, and I have given credit to Donaldson till to-morrow.*" Though there is no prescribed form of this kind of notice, yet it must import, that the holder looks on the indorser as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his business to take up the note; but notice of having given credit to the maker will discharge the indorser. The notice by another person to the indorser can never be sufficient, but it must proceed from the holder himself. New trial granted; When, in addition to the evidence on the former trial, one *Waks*, the defendant's attorney, swore, that in a conversation, which he held with *Donaldson* on 7th *October*, concerning the note, *Donaldson* told him, he was that moment come from *Brown's*, where he had left a message with *Mrs. Brown*, desiring her husband to take up the note; and at a meeting between the parties before action brought, this fact was admitted on both sides. *Verdict for plaintiff*—Motion for another new trial. Court said, that if the application had been made to defendant on the 6th, it would have been too late, because, plaintiffs had given credit to the drawer; that tho' the court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply, *where a verdict had been given against law. Rule absolute. Vide Metcalf v. Hall, T. 22 Geo. 3., where the court refused a third trial. 1 Term Rep. 168. Tindal v. Brown.*

Indorsement on
a blank note,
binds.

An *indorsement* written on a *blank note or check*, in the form of a bill of exchange, or promissory note, will bind the *indorser* for any sum, and time of payment; which the person to whom he indorses the note so indorsed shall insert in it, *Regis v. Langstaffe, Dougl. 514.*; and the *holder* may declare against such an *indorser*, as *indorsee* of a bill of exchange, or *promissory note*: *Ibid.* The indorsement on a blank note, is a letter of credit for an indefinite sum. *Ibid. 516.*

3d indorsee
against the
drawer.

Wiltshire, to wit. *Richard Penn*, late of *Salisbury*, in the said county, yeoman, was attached to answer *Alexander Dix* in a plea of trespass on the case; and whereupon the said *Alexander*, by G. S. his attorney, complains, *For that whereas*, the said *Richard Penn*, on the 21st day of *September*, in the year of our Lord 1794, to wit, at *Salisbury*, in the said county, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to one *John Denn*, and thereby, *one month* after the date thereof, promised to pay to the said *John*, or order, 100*l.* for value received: And the said *John*, to whom or to whose order the payment of the said sum of money, mentioned in the said note, was to be made afterwards, and before the payment of the said sum of money contained in the said note, or of any part thereof, and also before the time appointed by the said note for the payment thereof, to wit, on the day and year aforesaid, at *Salisbury* aforesaid, indorsed the said note, his own proper hand, being thereon subscribed, and by that indorsement, the said *John* appointed the contents of the said note, to be paid to one *Thomas Doe*, and then and there delivered the said note to the said *Thomas Doe*: And the said *Thomas Doe*, to whom or to whose order the payment of the said sum of money, contained in the said note, was to be made, afterwards, and before the payment of the said sum of money contained in

1st indorsement
by the payee of
the note.

2d indorsement.

in the said note, or of any part thereof, to wit, on the day and year aforesaid, at *Salisbury* aforesaid, indorsed the said note, his own proper hand being thereon subscribed, and by that indorsement, appointed the contents of the said note to be paid, to one *John Burn*, and then and there delivered the said note so indorsed to the said *John Burn*: And the said *John Burn*, to whom, or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made afterwards, and before the payment of the said sum of money contained in the said note, or of any part thereof, and also before the time appointed by the said note, for the payment thereof, to wit, on the day and year aforesaid, at *Salisbury* aforesaid, indorsed the said note, his own proper hand being thereon subscribed, and by that indorsement, the said *John* appointed the contents of the said note to be paid to the said *Alexander*, and then and there delivered the said note so indorsed to the said *Alexander*; of which said several indorsements, so made on the said note as aforesaid, the said *Richard*, afterwards to wit, on the day and year aforesaid, at *Salisbury* aforesaid, had notice; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *Alexander* the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said several indorsements so made thereon as aforesaid; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Salisbury* aforesaid, undertook, and then and there faithfully promised the said *Alexander*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said several indorsements so made thereon as aforesaid. And whereas, afterwards to wit, on the 24th day of *October*, in the year aforesaid, at, &c. Add money had and received, and common conclusion.

3d indorsement
to the plaintiff.

N. tes.

Notes.

The *third indorsee* of a promissory note kept it from 1 Nov. to 7 Jan. without receiving it of the maker of the note, and in an action against the *first indorsee*, without notice, the plaintiff was nonsuited for his neglect. *Pepys v. Lambert*, 1 Str. 707.

Every indorsement is the same as making a *new note*. If the note be payable the 1 May, and the indorsement appoints it to be the 1 April; as to the *indorser* this is a promissory note payable 1 April; but as against the drawer it would be otherwise. *Smallwood v. Vernon*, 1 Str. 479.

Evidence.

I take it, as the plaintiff in this case is to recover by his *own title*, he must prove the hand-writing of the drawer, as also of the *two indorsers to him*.

If the payee of a note pay the amount to an indorsee, the drawer, tho' a bankrupt, and obtained certificate, will be liable to him, for a new cause of action arises upon the payment.

The *payee* and *indorser* of two promissory notes brought an action against the *drawer*, who pleaded bankruptcy. It appeared in evidence, that the notes had been delivered, by the defendant before his bankruptcy, to one *Green*, with the indorsement of *Howis* upon them. After the bankruptcy, *Green* sued *Howis* as the indorser, and recovered against him, who now brought this action. *The court held*, that when the plaintiff paid the notes, a new cause of action arose against the *drawer*; for at the time of the bankruptcy, the plaintiff had no demand against the bankrupt. He could not have been petitioning creditor, because he had not paid the money at the time of the bankruptcy. *Harris v. Wiggins*, 4 Term Rep. 714.

Declaration by the payee against drawer's partners, on note payable to order.

Middlesex, to wit. *John Denn* complains of *Richard Fenn* and *Thomas Roe*, being in the custody, &c. For that whereas, the said *Richard* and *Thomas*, being partners and joint dealers together in trade and commerce, on the 21st day of September, in the year of our Lord 1794, to wit, at *Westminster* in the said county, made their certain note in writing, commonly called a promissory note, the hand-writing

writing of one of them being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *John*, and thereby, one month after the date thereof, promised to pay to the said *John*, or order, 50*l.* for value received, by them the said *Richard* and *Thomas*; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* and *Thomas* became liable to pay to the said *John*, the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, they the said *Richard* and *Thomas*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. Add the usual money count, and common conclusion.

Notes.

Where the declaration was, that the defendant made the note for himself and *B.* his partner, *subscribed with his own hand*, whereby the defendant promised for himself and partner to pay, the court held it good. The plaintiff has said, the defendant *R.* made it for himself and his partner, and subscribed it with his own hand, whereby he promised for himself and partner to pay, which shews sufficiently he signed it for himself and partner. *Ld. Ray. 841. Smith v. Jarvis.*

Where the note is subscribed by one partner only, as *Richard Fenn & Co.*, it will be necessary for the plaintiff to prove the defendants *partners*, as well as the hand-writing of the subscribing partner.

Where one partner signs a note for himself and partner, *it binds both, if it concerns the trade. Salk. 126.*

Action on note against three persons, *Austin*, *Shrabell*, and *Shirtliff*. They were declared against
If any of the partners be declared against in wrong name,

Declarations in Assumpsit.

the right name may be given in evidence to shew, that the person declared against was not a partner.

by the names of *William Austin*, *Robert Shrobell*, and *William Shirliff*; the two last were outlawed. On *non assumpsit*, the defendant gave in evidence, that the partnership consisted of *William Austin*, *Daniel Shrobell*, and *William Shirliff*; and the plaintiff was nonsuited. The court held, the evidence produced did not prove the instrument declared on, for the note was made by different persons than those stated in the declaration. *Gordon v. Austin*, 4 Term Rep. 611.

Declaration by partners drawers against the drawer, payable on demand.

Northamptonshire, to wit. *John Deau* and *Richard Rae* complains of *Robert Fenn*, being in the custody of the marshal, of the marshalsea, of our lord the now king, before the king himself, *For that whereas*, the said *Robert*, on the 22d day of *September*, in the year of our Lord 1794, to wit, at *Northampton* in the said county, made his certain note in writing, common called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *John* and *Richard*, and thereby promised to pay to the said *John* and *Richard*, on demand, 100*l.* for value received; by reason whereof, and by force of the statute in such case made and provided, the said *Robert* became liable to pay to the said *John* and *Richard* the said sum of money mentioned in the said note, when he should be thereto afterwards requested; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Northampton* aforesaid, undertook, and then and there faithfully promised the said *John* and *Richard*, to pay them the said sum of money mentioned in the said note, when he should be thereto afterwards requested. Add a count for money lent, money had and received, and common conclusion.

Notes.

It is necessary for the plaintiffs in this case to prove a demand on the drawer before the action brought,

brought, the note being payable on demand, and defendant's hand-writing.

Middlesex, to wit. *John Denn*, surviving partner of *Joseph Roe* deceased, complains of *Richard Fenn*, being in the custody of the marshal, of the marshal's office, of our lord the now king, before the king himself, For that whereas, the said *Richard*, on the 21st day of *September*, in the year of our Lord 1794, to wit, at *Westminster* in the said county, made his certain note in writing, commonly called a promissory note, his own hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to one *Thomas Rix*, and thereby, one month after the date thereof, promised to pay to the said *Thomas*, or order, 100*l.* for value received: And the said *Thomas*, to whom or to whose order the payment of the said sum of money, mentioned in the said note, was to be made after the making of the said note, and before the payment of the money contained in the said note, or of any part thereof, and also before the time appointed by the said note for the payment thereof, to wit, on the day and year aforesaid, at *Westminster* aforesaid, indorsed the said note, his own proper hand being thereon subscribed, and by that indorsement the said *Thomas* ordered and appointed the contents of the said note to be paid to the said *John* and *Joseph*, in the life-time of the said *Joseph*, (the said *John* and *Joseph* then being partners and joint dealers together in trade, and which said *Joseph* the said *John* hath survived,) and then and there delivered the said note so indorsed to the said *John* and *Joseph*, in the life-time of the said *Joseph*; of all which said premises the said *Richard*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *John* and *Joseph*, in the life-time of the said *Joseph*, the said sum of money mentioned in the said note, according to

Surviving partner indorsee against the drawer.

First indorsement.

Declarations in Assumpsit.

the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John* and *Joseph*, in the life-time of the said *Joseph*, to pay them the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid: *And whereas*. Add a count for money had and received to the use of the said *John* and *Joseph*, in the life-time of the said *Joseph*. *Yet* the said *Richard* (altho' often requested, &c.) hath not yet paid the said several sums of money, or any part thereof, to the said *John* and *Joseph*, in the life-time of the said *Joseph*, or to the said *John* since the death of the said *Joseph*, or to either of them; but to pay the same to the said *John* and *Joseph*, in the life-time of the said *Joseph*, or to the said *John* since his death, hath hitherto wholly refused, and still refuses to pay the same to the said *John*, surviving partner as aforesaid, to the said *John* his damage of 200*l.*; and therefore he brings his suit, &c. Pledges, &c.

• Breach.

Notes.

Where money is owing to two partners, and one dies, the executor of the deceased partner, and the surviving one, cannot join in the action; for the remedy survives, and such surviving partner will, on receipt of the money, be answerable to the executor of the deceased partner. 2 *Salk.* 444. *Ld. Ray.* 340.

Nor can the executor of such deceased partner, and the surviving one, be jointly sued, because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. *Carth.* 170. 2 *Lev.* 228.

Evidence.

On the general issue, I think, the plaintiff need not prove the death of his partner, only the bond-writing

writing of the defendant, and the payee of the note, being the indorsement.

Hampshire, to wit. *John Denn*, and *Ann* his wife, complains of *Richard Fenn*, being, &c. For *that whereas*, the said *Richard*, on the 21st day of *April*, in the year of our Lord 1794, to wit, at *Ledbury* in the said county, made his certain note in writing, commonly called a promissory note, his own hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Ann*, (whilst she was sole and unmarried), and thereby, one month after the date thereof, promised to pay to the said *Ann* (whilst she was so sole) 100*l.* for value received; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *Ann* (whilst she was so sole) the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Ledbury* aforesaid, undertook, and faithfully promised the said *Ann*, (whilst she was so sole), to pay to her the said sum of money mentioned in the said note, according to the tenor and effect of the said note. Add a count for money lent by said *Ann* (whilst she was sole) to the defendant, and conclusion as in p. 241.

By husband and wife, on note made payable to the wife whilst sole, against the drawer.

Notes.

Action brought by the indorsee of a promissory note, payable to *Susan Connor*, or her order, and given to her before marriage, which note after her marriage, and whilst covert, she indorsed to the plaintiff; plea that she was married at the time of the making the indorsement; plaintiff demurred. Question was, Whether plaintiff could maintain the action upon a note indorsed by a feme covert? Court were of opinion, that the feme covert could not assign the note, because, by act of law, it became

A note payable to a feme sole, or order, the married, it becomes her husband's property, and she cannot indorse it over whilst she is covert.

came the *sole right* and property of her *husband*. This shews that it was not an interest fixed to her person, because if it had, she might have indorsed it. *Connor v. Martin*, 3 *Wils.* 5, *Str.* 316, *S. C.*

A promissory note, payable to A. B. or order, may be indorsed and assigned over by his administrator; and the indorsee being plaintiff, need not make *profer* in *curiam* of the letters of administration, p. 432.

An action was brought by *Stone* against *Rawlinson* on a promissory note payable to *A. B.*, or order, and indorsed by the administratrix of *A. B.* *Rawlinson*, the defendant below, demurred, and shewed for cause, 1st, That *Stone*, in his declaration, had not made a *profer* of the letters of administration; 2dly, That it did not appear by whom the administration was granted; and 3dly, That an executor or administrator cannot by indorsement negotiate or assign over a promissory note by the custom of merchants, so as to give the indorsee an action thereupon in his own name. Judgment in *C. P.* for plaintiff—Error brought, and the common assignment and joinder. *Lit. C. J.* Suppose a plaintiff is assignee of a lease assigned to him by an administrator, is he obliged to make a *profer* in *curiam* of the letters of administration? I am of opinion he is not. The *act* has made promissory notes indorsable and assignable, in like manner as bills of exchange generally; and if the plaintiff in error would restrain or confine this power of indorsing or assigning notes to the persons only to whom such notes are payable, it lies upon him to shew that this is so, by the true meaning and construction of the statute; but that he has not done. The whole interest and property of this note was in the administratrix; which note, in its nature, is made assignable by act of parliament. As to the 2d objection: In an action brought by an administrator himself, whose power to sue is founded upon the letters of administration, it must be alleged in the declaration, that administration was committed to him, and that those who granted it had a right to grant it; but he who claims under an administrator, has no occasion to make a *profer* in *curiam* of the letters of administration, because he has

has not the same in his power or custody. Judgment affirmed. *Rawlinson v. Stone*, 3 Wils. 1.

Middlesex, to wit. *John Doe* complains of *Richard Roe*, being, &c. For that whereas, certain persons, using the name and firm of *Hanson and March*, on the 6th day of *March*, in the year of our Lord 1794, to wit, at *Westminster* in the said county, made their certain note in writing, commonly called a promissory note, in the name and firm of *Hanson and March*, the hand-writing of one of them being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Richard*; by which said note the said persons, so using the name and firm of *Hanson and March*, two months after the date thereof, promised to pay to the said *Richard*, or order, 50*l.* for value received: And the said *Richard*, to whom or to whose order the payment of the said sum of money, contained in the said note, was to be made afterwards, and before the payment of the said sum of money specified in the said note, or of any part thereof, and also before the time appointed by the said note for the payment thereof, to wit, on the day and year aforesaid, at *Westminster* aforesaid, indorsed the said note, his own proper hand-writing being thereon subscribed, and by that indorsement appointed the contents of the said note to be paid to the said *John*; and then and there delivered the said note so indorsed to the said *John*; of which said indorsement, so made on the said note as aforesaid, the said persons, so using the name and firm of *Hanson and March*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice; and the said *John* avers, that afterwards, and after the expiration of the said two months mentioned in the said note, to wit, on the 9th day of *May*, in the year aforesaid, to wit, at *Westminster* aforesaid, the said *John* shewed and presented the said note, with the said indorsement thereon, to the said persons so using the name and firm of *Hanson and March*,

Indorsee against the payee or first indorser, on note drawn by two persons whose christian names are not known.

Indorsement.

Averment.

Declarations in Assumpsit

March, and then and there requested them to pay the said sum of money therein specified to the said *John*, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; but the said persons, so using the name and firm of *Hansen and March*, did not then, or at any other time, pay the said sum of money mentioned in the said note, or any part thereof; to the said *John*, but then and there wholly refused to pay the same, or any part thereof, to the said *John*; of all which said premises, the said *Richard*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year last aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid. Add a count for money had and received, and common conclusion.

Notes.

A. having declared on a promissory note against *B.*, made by *C.* to *A.*, by him indorsed to *B.*, and by him again indorsed to *A.*, and having obtained a verdict, the judgment was arrested.

The plaintiff declared on a promissory note, made by one *Collins* payable to the plaintiff or order, and afterwards indorsed by him to the defendant, who afterwards re-indorsed it to the plaintiff again. The defendant pleaded the general issue. Verdict for plaintiff; and, on motion in arrest of judgment, *Ld. Kenyon*, It is an invariable rule, that every plaintiff must on his own stating of the case shew sufficient to entitle him to recover judgment against the defendant; and it is a rule equally clear,

clear, that every instrument ought to be declared on according to its legal import. I do not say, but that there may be circumstances which, if disclosed on the record, might entitle the plaintiff to recover on this note; but we are now called upon to form a judgment on the title, which he has disclosed. And on the face of the declaration, he has stated the note as a legal existing note, and the indorsements as legal existing indorsements; we are therefore bound to consider them to be so. Then the case stands thus: that he the plaintiff, being the original indorser of the note, calls on the defendant, who appears on the record to be a subsequent indorsee. And nothing can be clearer in law, than that an indorsee may resort to either of the preceding indorsers for payment; whereas the present action is an attempt to reverse this. I admit, that a case might happen in which the plaintiff might have stated, that he was substantially entitled to recover on this note, *e. g.* that his own name was originally used for form only, and that it was understood by all the parties to the instrument, that the note, though nominally made payable to the plaintiff, was substantially to be made to the defendant; but if such were the case, the note should have been declared on according to its legal import, as was held in *Minet v. Gibson*. A name may be omitted in the declaration, if the legal operation of the instrument requires it; but, in this case, the plaintiff has stated facts subversive of his title. *Bishop v. Haywood*, 4 Term Rep. 470. Judgment arrested. *Bulwer, J.* The consequence of supporting this judgment would be, that the plaintiff, without having any real demand on the defendant, may recover against him by the judgment of the court, without allowing to the defendant a possibility of defending himself; for on the trial it was only necessary for him to prove, that the note was given payable to the plaintiff, that it was indorsed by him to defendant, and by him re-indorsed to the plaintiff. The judge, on proof of this, was bound to say at *nisi prius*, that he was entitled

entitled to recover, because he had proved the whole of his declaration; after which, he relies on that verdict as conclusive, that he has a cause of action on the ground that this court must presume after verdict; that if the case supposed by the plaintiff had not been proved, he could not have recovered at *nisi prius*. But on a motion in arrest of judgment, we are bound to look at the writ, which the plaintiff himself has stated; beyond which, no presumption can be admitted. If the writ be defective on the face of it, the court cannot sustain the judgment. *Vide Rep. Temp. Hard. 118. Buller, N. P. 320.*

On a note, payee against drawer, payable by instalments, for the first instalment. Surry, to wit. *Richard Denn*, late of *Guildford*, in the said county, yeoman, was attached to answer *John Denn* in a plea of trespass on the case, &c.; and whereupon the said *John*, by *J. B.* his attorney, complains, That whereas, the said *Richard*, on the 10th day of February, in the year of our Lord 1794, to wit, at *Guildford*, in the said county, made his certain note in writing, commonly called a promissory note, his own hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *John*, and thereby promised to pay to the said *John*, or his order, fifty pounds in manner following: ten pounds on the 10th day of March, ten pounds on the 10th day of April, 10l. on the 10th day of May, 10l. on the 10th day of June, and the other 10l. on the 10th day of July then next, for value received by him the said *Richard*; by reason whereof, and by force of the Statute in such case made and provided, the said *Richard* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Guildford* aforesaid, undertook, and then and there faithfully promised the said *John* to pay him the said sum of money mentioned in the said note, according to the

the tenor and effect of the said note; And the said Averment.

John in fact saith, that after the making of the said note, to wit, on the said 19th day of *March*, in the year aforesaid, at *Guildford* aforesaid, a certain sum of money, to wit, the sum of 10*l.* of lawful money of *Great Britain*, part of the said sum of 5*0*l.** in the said note mentioned, became and was due and payable from the said *Richard* to the said *John*, upon and by virtue of the said note, and which said sum of 10*l.*, he the said *Richard*, then and there ought to have paid to the said *John*, according to the tenor and effect of the said note, and of his said promise and undertaking, so by him made in manner aforesaid: And whereas, Add account for money lent, and common conclusion.

Notes.

Assumpsit was brought by the indorsee of a note of hand, payable by instalments, and the plaintiff counted only for such sums as were due; and the court held, that the action could be maintained to recover for every default, and that he was not obliged to declare for the whole sum. *Alford v. Hand*, Andr. 370. Vide Cro. Jac. 504. *Backwith v. Natt*, 2 Saund. 264. *Cooke v. Whorwood*.

But debt will not lie till the last day of payment be past, on a contract to pay money by instalments on different days. *Rudder v. Price*, 1 H. Black. Rep. 547. Lord *Loughborough* said, I cannot, indeed, devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, *ex nomine*, as a debt. But the authorities are too strong to be resisted. In the older cases it is admitted, that an action of debt could not be brought for payment of money due by instalments till all the days were past; the meaning of this was, that no action would lie. The inconvenience of this rule put the judges upon a method of getting rid of the supposed difficulty by having recourse to the action of

But debt will not lie on such a note, until all the days be past. 4 Co. 94. *Slades' Case*. Cro. Eliz. 807. *Owen v. Firm. N. B.* 304.

Declarations in Assumpsit.

of *assumpsit*, which, where the *assumpsit* proceeds in the demand of money, is, in truth and substance, and so taken to be in some of the cases, a more *special action of debt*: for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered damages; it is the specific debt, and the jury give the specific thing demanded.

Why debt will not lie till all the days be past.

The idea that an *action of debt* cannot be brought till all the days of payment are past, is founded on a good ground of law, that for one contract there shall be but one *action*; and as a contract to pay a certain sum on several days of payment is considered as one contract, it follows, that no *action* can be brought till all the days of payment are elapsed. *Ibid.*

But debt will lie on a bond.

But debt on bond by instalments will lie before the last day be past, for the bond became absolute for not performing the first, or any of the payments in the condition; and there is a difference in debt on such a deed as this, and an *action* on a contract for paying several sums at several times. *Coates v. Hawit*, 1 *Wils.* 80.

Payee against drawer on note payable by instalments, and if one of those be not paid, the note to be in force for the whole sum. This is for the whole sum.

Surry, to wit. John Doe complains of Richard Roe, being, &c. For that whereas, the said Richard, on the 1st day of January, in the year of our Lord 1794, to wit, at Guildford, in the said county, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed; bearing date the day and year aforesaid, and then and there delivered the said note to the said John, and thereby promised to pay to the said John, or order, 90*l.* for value received; the same to be paid in manner following: the sum of 10*l.*, at or within nine days after every quarter-day, till the said sum of 90*l.* should be fully discharged, the first payment to be made at or within nine days of Lady-day then next, and so to continue quarterly until fully completed; and in default of payment of any or either of the said quarterly payments, or any part thereof, the said whole note to be in full force for the whole of

the said 90l.; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *John* the said sum of money contained in the said note, according to the tenor and effect of the said note; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Guildford* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money specified in the said note, according to the tenor and effect of the said note; And the said *John* avers, that the said *Richard* did not pay to the said *John* the first payment of 10l., which by the said note was to be paid to him at or within nine days next after Lady-day now last past, whereby the said note became and was and is in full force for the whole of the said sum of 90l., whereof the said *Richard*, afterwards to wit, on the 4th day of *April*, in the year aforesaid, at *Guildford* aforesaid, had notice. Add a count for money lent, and money had and received, and common conclusion.

Averment of the first instalment being unpaid.

Notes.

If the whole of the money be due on this note, then the averment must be omitted.

In declaring on a note, it ought to be set out as it really is; and where the plaintiff left out the contingencies specified in the note, it was held to be a variance, supposing the note had been good, *Roberts v. Peake*, 1 Burr. 325; and an averment that *Geo. Henshaw* did leave one of them sufficient to pay it, or that the defendant was otherwise able to pay it, was necessary. *Per Dennis and Foster, J. Ibid.*

Note ought to be set out in declaration, as it really is.

Middlesex, to wit. *John Doe* complains of *Richard Roe*, being in the custody, &c. For that whereas, the said *Richard* and one *David Denn*, on the 20th day of *March*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, made

Declaration on note, payee against one of the drawers, made by two, payable jointly or severally.

Declarations in Assumpsit.

made their certain note in writing, commonly called a promissory note, their own proper hands being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *John*, and thereby, *one month after the date thereof, jointly or severally promised to pay to the said John, or order, 50l. for value received*; by reason whereof, and by force of the statute in such case made and provided, the said *Richard* became liable to pay to the said *John* the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. Add the usual money counts, and conclusion.

Notes.

Formerly on a joint or several note could not declare against one. *Sir. 76. Ld. Ray. 1544.*

But now this doctrine is overruled.

The plaintiff declared upon a promissory note, by which the defendant, and one *A. B.*, *conjunctim aut seperatim*, promised to pay. There was a verdict and judgment for plaintiff; which was reversed for want of the plaintiff's shewing a title to bring a separate action against one of the makers of the note, for the declaration stated he has this, or some other cause of action. *Ovington v. Neale, Sir. 812.* But this doctrine has been overruled, and it is now held, that in an action on a joint or several promissory note against one, a declaration, that *he and another* made their promissory note, by which they *jointly or severally* promised to pay, is good. for if *or* must be understood as a *disjunctive*, the election, whether the note shall be joint or several, is in the person to whom it is given, and by suing one, he shews his election to consider it as a several note. But in this case, the true construction of the word *or*, is, that it is synonymous with *and*. They both promise

promise that *they*, or *one of them*, shall pay; therefore the liability is on *both*, and on *each*. The nature of this transaction forces this construction. *Rees v. Abbott*, Cow. Rep. 832. And per Buller, J. if the note had been *joint only*, and it had been stated as a *several one*, no advantage could have been taken of this, but by a plea in abatement. *Ibid.*

If a note of hand be, "*We promise to pay*," and signed by "*one*" of the parties only, the "*one*" that signed it will be liable, and the declaration may state it in the *singular* number; for it may be declared on according to its *legal operation*. 1 Burr. 323. *Roberts v. Peake*.

Middlesex, to wit. *John Denn*, administrator By the administrator of the payee, against drawer. of all, and singular the goods, chattels, and credits, which were of *Thomas Roe* deceased, complains of *Richard Fenn*, being, &c., *For that whereas*, the said *Richard*, on the 10th day of *September*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Thomas* in his life-time, and thereby, *one month after the date thereof*, promised to pay to the said *Thomas*, or order, *£94* for value received; by reason whereof, and by force of the statute, in such case made and provided, the said *Richard* became liable, to pay to the said *Thomas* in his life-time, the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *Richard*, in consideration thereof, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *Thomas* in his life-time, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. *Add a count for money lent by the testator in his life-time*, and conclusion as in p. 241.

Middlesex,

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Declaration by the 2d indorsee of a promissory note, against the drawer, where the payee died, and his executor indorsed it over to the plaintiff.

Middlesex, to wit. *John Denn* complains of *Richard Fenn* being, &c., For that whereas, the said *Richard*, on the 6th day of *January*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, made his certain note in writing, commonly called a promissory note, his own proper hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to one *Isaac Dell*, and thereby, two months after the date thereof, promised to pay to the said *Isaac Dell*, or order, 50*l.* for value received; and the said *John* in fact saith, that the said *Isaac Dell*, to whom or to whose order, the payment of the said money, mentioned in the said note specified, was by the said note, to be made after the making thereof, and before the payment of the said sum of money therein mentioned, to wit, on the day and year aforesaid, at *Westminster* aforesaid, died, having first made and published his last will and testament in writing, and thereby appointed *John Dix* sole executor thereof, after whose death, to wit, on the (a) 10th day of *February*, in the year aforesaid, at *Westminster* aforesaid, the said *John Dix* proved the said will, and took upon himself the burthen of the execution thereof; and afterwards, and before the payment of the said sum of money specified in the said note, or of any part thereof, to wit, on the day and year aforesaid, at *Westminster* aforesaid, the said *John Dix* indorsed the said note, his own hand being thereto subscribed, and by that indorsement, ordered, and appointed the contents of the said note, to be paid to the said *John*, and then and there delivered the said note so indorsed to the said *John*; of all which premises, the said *Richard*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice: by reason whereof, and by force of the statute, in such case made and provided, the said *Richard* became liable

(a) After death of the testator.

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to pay to the said *John*, the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid; and being so liable, he the said *John*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the said indorsement so made thereon as aforesaid. Add a count for money lent, and conclusion.

Notes.

If the *payee* of a note or bill *dies*, it devolves to his personal representatives, his executors, or administrators, and in that character they may bring an action on it. 1 *Term Rep.* 487. *King Ex. v. Thorn.* And they may indorse it, and their indorsee may maintain an action, in the same manner, as if the indorsement had been by the testator or intestate. But on their indorsement, they are liable personally to the subsequent parties, and not as executors; for they cannot charge the effects of the testator. 3 *Wilf.* 1. *Robinson v. Stone.* 2 *Str.* 1260, cited in 2 *Burr.* 1225. 1 *Term Rep.* 487.

And in an action brought by an indorsee of a note, indorsed by an administratrix, such indorsee need not make a *proferit in curiam* of the letters of administration, because he has not the same in his power or custody. *Robinson v. Stone.* 3 *Wilf.* 1. But upon the trial, it will be incumbent on him to shew to the jury, that the person who indorsed the note to him, was the legal and proper administrator. *Ibid.* cited in 2 *Burr.* 1225. 2 *Str.* 1260. *Robinson v. Stone.*

Middlesex, to wit. *John Denn* and *Richard Fenn*, assignees of the estate and effects of *Alexander Roe*,
F f according to the payee

If the payee of a note or bill dies, it devolves to his personal representative, and he may indorse it.

No occasion to make a proferit of letters of administration.

assignees of a bankrupt.
The payee

against the
drawer of a
note, p. 125,
272.

according to the form and effect of the several statutes, made and now in force, concerning bankrupts, complain of *Simon Doe* being, &c. *For that whereas*, the said *Simon*, on the 21st day of *February*, in the year of our Lord 1794, to wit, at *Westminster*, in the said county, made his certain note in writing, commonly called a promissory note, his own hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said *Alexander*, before he became a bankrupt, and thereby, *one month after the date thereof, promised to pay to the said Alexander, or order, 40l. for value received*; by reason whereof, and by force of the statute, in such case made and provided, the said *Simon* became liable to pay to the said *Alexander*, before he became a bankrupt, the said sum of money mentioned in the said note, according to the tenor and effect of the said note; and being so liable, he the said *Simon*, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at *Westminster* aforesaid, undertook, and then and there faithfully promised the said *Alexander*, to pay him the said sum of money mentioned in the said note, according to the tenor and effect of the said note. *Add a count for money lent, by the said Alexander, before he became a bankrupt, to the defendant, and the conclusion as in p. 272.*

Notes. Vide p. 125. 272.

Bills and notes,
of which the
bankrupt is
payee, &c. be-
comes vested in
assignees.

If a man become bankrupt, the property of bills and notes, of which he is the payee or indorsee, vests in his assignees, and the right to transfer, is in them. And if in fact he indorse a bill or note after his bankruptcy, and that be discovered before it be paid, the assignees may recover it back from his indorsee, in an action of trover, and if the money be received, they may recover the money in an action for so much money paid to their use.

If the payee of a note, pay the amount of it to an indorsee, after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. *Towres v. Wiggins*, 4 Term Rep. 714. For when the plaintiff had paid the note, a new cause of action arose against the drawer, for at the time of the bankruptcy, this plaintiff had no demand against the bankrupt. *Vide 3 Will. 528. 3 Will. 13. 262. Cowp. 460.*

Middlesex, to wit. Richard Roe, late of, &c., and Alexander Fenn, late of, &c., yeomen, were attached to answer John Denn, in a plea of trespass on the case; and whereupon the said John, by J. K. his attorney, complains, For that whereas, one Richard Hawes, on the 6th day of May, in the year of our Lord 1794, to wit, at Westminster, in the said county, made his certain note in writing, commonly called a promissory note, his own hand being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to one Michael Jee, and thereby, one month after the date thereof, promised to pay to the said Michael, or order, 100*l.* for value received; and the said Michael, to whom or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made, afterwards, and before the payment of the said sum of money contained in the said note, or any part thereof, and also before the time appointed by the said note, for the payment thereof, to wit, on the day and year aforesaid, at Westminster aforesaid, indorsed the said note, his own hand being thereto subscribed, and by that indorsement, appointed the contents of the said note to be paid to the said Richard and Alexander, and then and there delivered the said note, so indorsed, to the said Richard and Alexander; and the said Richard and Alexander, to whom or to whose order, the payment of the said sum of money, mentioned in the said note, was to be made, afterwards, and before the payment of the said sum of money therein specified, or any part thereof,

If payee, pay amount of note to an indorsee after bankruptcy of drawer, he may still recover against them.

3d indorsee against indorsers partners.

1st indorsement

2d indorsement by defendant to plaintiff.

Averment of
presenting the
note to the
drawer for pay-
ment, who re-
fused.

thereof, and also before the time appointed by the said note, for the payment thereof, to wit, on the day and year aforesaid, at *Westminster* aforesaid, indorsed the said note, the hand-writing of one of them being thereto subscribed, in the name, stile, and firm of their partnership, to wit, of *Roe* and *Fenn*, being thereto signed and subscribed, and by that indorsement, the said *Richard* and *Alexander*, ordered and appointed the contents of the said note, to be paid to the said *John*, and then and there delivered the said note, so indorsed, to the said *John*; of which said several indorsements, so made on the said note as aforesaid, the said *Richard Hawes*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice: And the said *John* avers, that afterwards, and after the expiration of the said one month, in the said note mentioned, to wit, on the 9th day of *June*, in the year aforesaid, to wit, at *Westminster* aforesaid, the said *John* shewed and presented the said note, with the said several indorsements thereon subscribed, to the said *Richard Hawes*, and then and there requested him to pay the said sum of money therein specified, according to the tenor and effect of the said note, and of the said several indorsements, so made thereon as aforesaid: but the said *Richard Hawes* did not then, or at any other time whatsoever, pay the said sum of money therein mentioned, or any part thereof, to the said *John*, but then and there wholly refused, and neglected so to do, neither hath the said *Michael Fee* yet paid the same, or any part thereof, to the said *John*: of all which premises, the said *Richard* and *Alexander*, afterwards to wit, on the day and year aforesaid, at *Westminster* aforesaid, had notice; by reason of which said several premises, and by force of the statute, in such case made and provided, the said *Richard* and *Alexander*, became liable to pay to the said *John*, the said sum of money mentioned in the said note, according to the tenor and effect of the said note, and of the
said

said several indorsements, so made thereon as afore-
said; and being so liable, they the said *Richard*
and *Alexander*, in consideration thereof, afterwards
to wit, on the same day and year last afore said, at
Westminster afore said, undertook, and then and
there faithfully promised the said *John*, to pay him the
said sum of money mentioned in the said note, ac-
cording to the tenor and effect of the said note,
and of the said several indorsements, so made
thereon as afore said: *And whereas*, the said *Richard*
and *Alexander*, afterwards to wit, on the day and
year last afore said, &c. *Add money lent, and com-*
mon conclusion.

Notes.

Where a bill or note is drawn in favor of *two* Indorsement in
or more in partnership with one another, an indorsement partnership,
by one, in their partnership-name, will bind both. name by one,
But where *two partners* drew a bill, payable to their good.
own order, and signed by both, and one only indorsed But where a bill
it, although the court held that by making the bill was drawn and
payable to "*our order*," they had made themselves signed by two
partners as to this transaction: Yet, on a new trial, partners, the in-
proof being offered, that by the universal usage and dorsement by one
understanding of all the bankers and merchants, in is not sufficient.
London, the indorsement was bad, because not
signed by both the payees; and the jury declaring
they knew it to be as stated, although the evidence
was objected against, as the point had been de-
cided by the court as question of law: *Lord Man-*
field said, he did not think the question was so
decided as to preclude the evidence offered: and
therefore over-ruled the objection, and a verdict
was found for the defendant. *Carvick v. Vickery*,
Doug. 653, in notes.

Hertfordshire, to wit. *John Denn* complains of Declaration by
Richard Fenn, being, &c. For that whereas, the the lessee of
said *Richard*, on the 20th day of *October*, in the tithes against
year of our Lord 1794, to wit, at *Hemel Hemp-* the defendant,
stead, in the said county, was indebted to the said who agreed to
pay a composi-
tion for same.

Declarations in Assumpsit.

John (he the said *John* before that time; and then being *farmer* and *proprietor* of all and singular the tithes arising, growing, renewing, and happening in the said parish of *Hemel Hempstead*, in the county aforesaid, and within the bounds, limits, and titheable places of the said parish,) in the sum of 10*l.* of lawful money of *Great Britain*, for certain tithes, due and of right payable to the said *John* as such *farmer* and *proprietor* as aforesaid, in respect of certain lands of the said *Richard*, situate, lying, and being in the said parish of *Hemel Hempstead*, in the county aforesaid, and within the bounds, limits, and titheable places of the said parish, by the said *John* before that time bargained and sold to the said *Richard*, and at his special instance and request, and by the said *Richard*, according to that bargain and sale, had, taken, and received to his own use; and being so indebted, he the said *Richard*, in consideration thereof, afterwards to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, undertook, and then and there faithfully promised the said *John*, to pay him the said sum of money, when he should be thereto afterwards requested; And whereas, afterwards to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, in consideration that the said *John* had before that time bargained and sold to the said *Richard* certain other tithes, due and of right payable to the said *John* as such *farmer* and *proprietor* as aforesaid, in respect of certain other lands of the said *Richard*, situate, lying, and being in the said parish of *Hemel Hempstead*, in the county aforesaid, and within the bounds, limits, and titheable places within the said parish; and that the said *Richard* had, according to such last-mentioned bargain and sale, taken and received the said last-mentioned tithes to his own use, he the said *Richard*, undertook, and then and there faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have

have of the said *Richard*, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 10*l.* of like lawful money, to wit, at the parish aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards to wit, on the same day and year aforesaid, there had notice. Add the common conclusion, as in p. 194.

... *Bedfordshire*, to wit. *John Denn* complains of *Richard Fenn*, being, &c. For that, whereas, the said *Richard*, on the 20th day of *October*, in the year of our Lord 1794, to wit, at the parish of *C.*, in the said county, was indebted to the said *John* (he the said *John* before that time and then being (a) proprietor (and owner) of all and singular the tithes arising, growing, renewing, and happening in the said parish of *C.*, in the county aforesaid, and within the bounds, limits, and titheable places of the said parish,) in the sum of 10*l.* of lawful money of *Great Britain*, for certain tithes, due and of right payable to the said *John* as such (b) proprietor (and owner) as aforesaid, in respect of certain lands of the said *Richard*, situate, lying, and being in the said parish of *C.*, in the county aforesaid, and within the bounds, limits, and titheable places of the said parish, by the said *John* before that time bargained and sold to the said *Richard*, and at his special instance and request, and by the said *Richard*, according to that bargain and sale, had, taken, and received to his own use; and being so indebted, he the said *Richard*, in consideration thereof, &c.

And whereas, afterwards to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, in consideration that the said *John*, at the like request of the said *Richard*, had before that time bargained and sold to the said *Richard* certain other tithes due, and of right payable to the said *John* as such (c) proprietor (and owner) as

(a) Rector and proprietor.
(c) Rector and proprietor.

(b) Rector and proprietor.

Declarations in Assumpsit.

aforesaid, in respect of certain other lands of the said *Richard*, situate, lying, and being in the said parish of *C.*, in the county aforesaid, and within the bounds, limits, and titheable places within the said parish; and that the said *Richard* had, according to such last-mentioned bargain and sale, taken and received the said last-mentioned tithes to his own use, he the said *Richard*, then and there undertook and faithfully promised the said *John*, to pay him so much money as he therefore reasonably deserved to have, when he should be thereto afterwards requested; and the said *John* avers, that he therefore reasonably deserved to have of the said *Richard* other 10*l.* of like lawful money, to wit, at the parish aforesaid, in the county aforesaid, whereof the said *Richard*, afterwards to wit, on the day and year aforesaid, there had notice.

Indebitatus assumpsit on the agreement for composition of the tithes.

And whereas the said *Richard*, afterwards to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was indebted to the said *John* (being such (a) proprietor and owner of the tithes aforesaid) in other 10*l.* of like lawful money, for certain other tithes arising, growing, renewing, and happening in the said parish, and within the bounds, limits, and titheable places within the said parish, due and of right payable to him the said *John* as such (b) proprietor and owner as aforesaid, before that time sold by the said *John* to the said *Richard*, and at his request, and before then had and retained to his own use, by virtue of a certain agreement and composition for the said tithes, before then made between the said *John* and the said *Richard* in that particular, and which said tithes were payable to the said *John*, as such (c) proprietor and owner as aforesaid, from the said *Richard* to the said *John*, for and in respect of certain lands in the possession and occupation of the said *Richard*, situate in the parish aforesaid, in the county aforesaid; and being so indebted, he the

(a) Rector and proprietor.

(b) Rector and proprietor.

(c) Rector and proprietor.

said

Declarations in Assumpsit.

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said *Richard*, in consideration thereof, afterwards, &c. undertook, &c.

And whereas, afterwards to wit, on the day and *Quantum meruit* year aforesaid, at the parish aforesaid, in the county thereon. aforesaid, in consideration that the said *John*, (as such (a) proprietor and owner of the tithes aforesaid) at the like request of the said *Richard*, had permitted the said *Richard* to take and retain to his own use, certain other tithes, due and of right payable to the said *John*, as such (b) proprietor and owner as aforesaid, from the said *Richard*, as occupier and possessor of certain other lands situate in the parish aforesaid, in the county aforesaid, and within the bounds, limits, and titheable places within the said parish; and that the said *Richard* had, according to that permission, taken and received the said last-mentioned tithes to his own use, he the said *Richard*, then and there undertook, &c. as in the last *quantum meruit*. Add the common conclusion, p. 194.

Notes.

When dioceses were divided into parishes, the Rectors, tithes of each parish were allotted to its own particular minister, first by common consent, or appointments of lords of manors, and after by the written law of the land; and tithes are due of common right to the parson, (who is called the *rector* (c) or *governor* of the church) who, during life, has the freehold in himself of the *parsonage-house*, the *glebe*, the *tithes*, and *other dues*. But sometimes these are *appropriated* (d); the benefice being

(a) Rector and proprietor.

(b) Rector and proprietor.

(c) Rector of a parish, the parson, or he who has the care or cure of a parish. *Rectory*, or *rectorate*, *rectoria*, a parish church, patronage, or spiritual living, with all its rights, glebes, and tithes.

(d) Appropriation, is where the advowson of a parsonage is given or belongs to any bishoprick, religious house, college, &c. and to their successors, so that the house or body is both patron and parson,

and

Declarations in Assumpfit.

being perpetually annexed to some *spiritual corporation*, either *sole* or *aggregate*, being the *patron* of the living, whom the law esteems capable of providing for the service of the church, as any single private clergyman. Such *patrons* retain the *tithes* and *glebe* in their *own hands*; without presenting any clerk, *they undertaking to provide for the service of the church*. When the *appropriation* is thus made, the *appropriators*, and their *successors*, are perpetual parsons of the church, and must sue and be sued, in all matters concerning the *rights of the church*, by the *name of parsons*. *Hob. 307.*

Rector,

If the *predial tithes* of the parish be *impropriated* (a) or *appropriated*, i. e. either in *lay hands*, or in those of some ecclesiastical community, then, instead of *rector*, the parson is called *vicar*; the smaller *tithes*, or a convenient salary for his support, being allowed to him by the *impropriator* or *appropriator* for maintenance. But if a vicar has part of the *great tithes*, and also of the *glebe*, he then is called a *vicar endowed*. *Vide stat. 15 R. 2. c. 6. 4 H. 4. c. 12. Vide 29 Car. 2. c. 8.*

Vicar,

Tithes are divided into *great* or *small*. The *former*, consisting of corn, hay, wood, &c. which arise from the land spontaneously, or by manurance, are called *predial*, and belong to the *rector*, or *impropriator*.

The *latter* consist of potatoes, clover seed, herbs in gardens, wool, milk cheese, and the young of animals, wax, honey, flax, hops, tobacco, &c. and are called *mixt tithes*; and belong to the *vicar*, unless he is annually allowed for.

They are an *incorporeal inheritance*, and do not pass *without deed*. All persons ought to pay their

and some one of the members officiates as vicar. It is called *appropriation*, because the profits of the living are appropriated to the use of the patrons, so that parsons, though they are not ordinarily accounted *domini usu fructuarii*, having no right of fee simple, yet, by reason of the perpetuity of their succession, are here reputed owners of the fee simple, and are therefore called *propriarii*.

(a) *Impropriation* is a term used where the profits of an ecclesiastical benefice, are in the hands of a *layman*.

tithes

tithes to whom they are due, and all lands of common right ought to pay, 11 Co. 15, a. and to be paid by the occupier. *Ibid.*

Frequently the *rector*, *impropriator*, and *vicar*, grant a lease of the tithes to a lay person, who is called *farmer*; he afterwards agrees with the persons liable to pay tithes, for so much money to be paid in lieu thereof, and such farmer may either sue for the same in the *spiritual court*, or bring *indebitatus assumpsit* for the *composition*; the latter is generally the approved mode of proceeding.

The proof to support the declaration *ass. the* Proof atts. the *farmer* of the tithes, will be, (as I conceive,) *farmer.*

1. The execution of the lease to him. 2. That the grantor is *rector*, which may be done by the parish clerk, who will prove his officiating as such. 3. The agreement with the defendant for the composition; and 4. That defendant was liable to pay the tithes in respect of the land he occupies; which may be done, by proving him in the occupation of the same. If on the *quantum meruit*, you must enter into further proof, by shewing the taking away the tithes by the defendant, and the value.

If the *lay impropriator* brings this action, he *If atts. the* need not prove more, (as I conceive,) than that he *impropriator.* is *impropriator* generally, that other occupiers in the parish pay tithes to him, *the agreement for composition*; or, if he goes on the *quantum meruit*, then further, the taking them away by the defendant, and the value of them so taken.

If the *rector* brings his action, he will, of course, *If atts. rector.* (by the parish clerk,) prove himself *rector*, and entitled to the tithes claimed, the agreement with defendant to pay, and that he is occupier of the lands in the parish.

But it is said, if a parson brings an action of debt for tithes upon the statute, upon *nil debet* 2 & 3 Ed. 6. pleaded, he must, if the defendant puts him to it, *c. 13. for not setting them out.* prove his *institution* and *induction*, and *reading of* *the thirty-nine articles*, otherwise he will be nonsuited,

Declarations in Assumpsit.

suit, for that is his title to the tithes. *Lill. Pract. Reg.* 553. *Viner*, 12 vol. 65. title *Evidence*. His declaration in the church, within the time limited by the statute, of his full and free assent and consent to all things contained in the book of common prayer. *Snow v. Philips*, *Sid.* 220.

If an agreement to pay be proved, there can be no occasion to prove institution, &c.

And where the plaintiff being farmer under the dean and chapter of *Canterbury*, and proving he had received tithes for some years as such, it was holden sufficient, without producing any lease, *Hartridge v. Gibbs*, *Pemberton, C. J. Buller, N. P.* 188. So if the plaintiff claim as parson, if the title be not in question, it is sufficient if he prove himself in quiet possession; but if the title be in question, then he must prove all the requisites as before stated. *Ibid.*

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balance of a general account
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A lien from usage is matter of
evidence *ibid.*

Wharfage is due for landing on
the wharfs 286

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If a vessel comes colorably, and
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cessary to load or unload, and
this colorable coming thither,
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